A TREATISE OF THE LAWS FOR THE RELIEF AND SETTLEMENT OF THE POOR.

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CHAPTER XXIII.

Of Settlement, upon a Tenement of ten Pounds a Year Value.

SECT. I.

Division of the Subject.

THIS kind of settlement depends upon 13 & 14 Car. II. which confines the power of removal to cases where persons "come to settle in any tenement, under the yearly value of ten pounds." (1) Statute 13 & 14 Car. II. c. 12.

The act speaks of the annual value, without mention of the inhabitant's estate or interest, and at first view Expositions of the word.

(1) See chap. xvi. vol. I. p. 248. This species of settlement, as also that by estate, are rather cases excepted out of this statute than regulated by it

seems to require, that all tenements which give a settlement should be of the yearly value of ten pounds, without reference to the nature or manner of acquiring the estate, whether freehold, copyhold, leasehold, or a minor interest.

Extends, 1 To freeholds.

The judges entertained originally, some doubt, whether this was not the true construction (1). It has however been long settled, that where the inhabitant has a freehold (2) or copyhold (3) interest, the yearly value of the tenement is immaterial. (4)

2 Copyhold.

3 Leaseholds.

And it is so likewise, where a leasehold interest devolves upon the party by the operation of law (5). The rule extends to leaseholds purchased for a valuable consideration. For it is laid down by Lord Chief Justice Lee, that "before 9 G. I. c.7. every body that came into a parish, and made *any purchase whatever*, was irremoveable (6)." It is likewise observed by Mr. Justice Dennison, that in Mursley *v.* Grandborough, it was holden by Lord Chief Justice Pratt, Mr. Justice Eyre, and Mr. Justice Fortescue, "that any person who has an estate of freehold,

(1) Rex *v* Stanmore, Sl in. 268.

(2) See cases cited, vol. 1. p 254 post chap. xxiv.

(3) Harrow *v.* Edgware, fol. 237. Rex *v.* Burcleer, 1 Str. 163, where the pauper was certificated.

(4) As to the effect of 9 G I. c 7. s 6 upon the value of estates acquired by purchase, see post chap. xxiv.

(5) Mursley *v.* Grandborough, 1 Str. 97. Burcleer *v.* Eastwoodhay, supra (3) and the cases cited, post. chap. xxiv. These cases seem excepted from 13 & 14 Car. II. not only because the preamble of the statute refers only to persons in a state of vagrancy, which such inhabitants are not, but also, because the words "coming to settle, are used in the enacting part which seems to imply, that it must be the party's voluntary act, with the intention of settling himself. See the opinion of the judges; and particularly Lee J. Rex *v* Sundrish, Burr. S.C 7. Rex *v.* Tedford, Ib 57.; of Aston, J. Rex *v.* Uttoxeter, Burr. S C. 538.; of Grose J. Rex *v.* Stone, 6 Term Rep. 295.

(6) Rex. *v.* Standsfield, Burr. S.C. 210.; case of certificated person; and see Rex *v.* St. Mary's Whitechapel, ib. 55.

copyhold, *or for years, by act of law,* (as descent, marriage, executor, administrator,) or *purchase,* may dwell upon it as his own, and is not removable, if he continues forty days; though under 10l. *per annum.* But he must abide forty days in order to gain a settlement. And notice is not necessary, because he is not removable from it. But Powys held *contra*, as to a term for years, under 10l. *per annum* value." (1)

And in a very recent case, Mr. Justice Lawrence remarks, that the justice's power to remove is founded on 13 & 14 Car. II. c. 12., which extends to any person who shall come to settle in any tenement under the yearly value of 10l.; and these words never having been deemed to relate to persons living on their own estates, *whether acquired by purchase* or otherwise, or at whatever value; it followed, that every person residing irremoveably for forty days in that parish where his own property was, gained a settlement. (2)

There are two kinds of estates, therefore, in which the *annual* value of the tenement is immaterial. Annual value, when immaterial.

1st, Freehold, or copyhold.

2d, Leasehold interests, " which devolve upon the party by operation of law (3)," or are acquired by purchase. (4)

The present species of settlement arises from the possession of a tenement of the annual value of 10l. when obtained This settlement extends to

(1) Rex *v.* West Shefford, Burr. S. C. 310.; and a note by Sir James Burrow, confirming the accuracy of Mr. J. Dennison's note.

(2) Rex *v.* Martley, 5 East, 44.

(3) See the opinion of Lord Kenyon, C. J. Rex *v.* Stone, ante, 2. (5).

(4) Semb. Rex *v.* Standsfield, ante, 2. (6). As to the meaning of the word purchase, see post. chap. xxiv.

other cases than renting a tenement.

obtained by some other than the preceding means. It is generally considered as acquired by *renting* a tenement of the yearly value of 10l. (1), not only because the occupation is usually under a contract to pay rent, and the credit given to the tenant, and his ability to pay 10l. *per annum*, have been deemed reasons for this exception in the statute, and the ground of the settlement (2): but also perhaps from the 9 & 10 W. III. c. 30. having made the taking a lease of a tenement of that value necessary towards obtaining a settlement, by a person residing under a certificate (3). But this opinion is not strictly accurate. Lawful possession of a tenement, of sufficient value, if it be absolute and independent, confers a settlement, although the occupier is exempt from paying rent. (4)

To lawful possessions when no rent paid.

I and given to a pauper as tenant at will.

It seems therefore to include cases of voluntary donation, where the occupier has an interest of sufficient permanency to entitle him to acquire a settlement by estate.

His brother gave the pauper a close, in the following manner: "I will give you a close in the parish of A.,

(1) See Rex *v.* Stanmore, ante, 2. (1). Harrow *v.* Edgware, ante, 2. (3). South Sydenham *v.* Lamerton, 2 Bott, 128. Pl. 171. Post. sect 2. The makers of 9 & 10 W. III. c. 11. seem to have considered it in this light when they enacted, that no person coming into a parish under a certificate shall gain a settlement there, by any act whatever, "unless he or they shall really and bonâ fide, take a lease of a tenement of the value of 10l." &c. This is considered as referring to the annual, and not the absolute value of the tenement, in conformity to 13 & 14 Car. II. See the words of Lord Mansfield, C. J. Rex *v.* Cold Ashton, Burr. S. C. 430. and the cases cited hereafter.

(2) Kinver *v.* Stone, 1 Str. 678. post. 8. (4), and the cases hereafter cited.

(3) See ante, 3.

(4) See post. sect. iv. This distinction purposely excludes the consideration of the leasehold interests purchased for more than 30l. and of a less annual value than 10l., for which see post. chap. xxiv.

 con-

containing about four acres, to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it." It was held, that such possession, when coupled with residence, conferred a settlement; for the words of the statute are satisfied, as the party comes to reside on a tenement, of the yearly value of ten pounds. (1)

This is to be distinguished, however, from the mere residence as a lodger, servant, &c. uncoupled with an interest (2). For if another person is the actual occupier or tenant of the premises, a mere permission to use the premises in a subordinate condition, does not confer a settlement. (3)

Some difference may possibly exist in this particular, between persons who do not reside under a certificate in the parish where they claim a settlement, and those who do. The latter is expressly prohibited by 9 & 10 W. III. c. 11. from "gaining a settlement in the parish "to which he comes with such certificate, unless he "takes a lease of 10l. *per annum*, or shall execute some "annual office in such parish (4)." It seems therefore that to avoid a certificate, there must be a taking a lease, and the relation of landlord and tenant constituted between the party who makes the demise and him who is let into possession. But it is sufficient if it be a taking by a parol for a year (5), or a lease at will (6). It seems to have been doubted in one case (7), whether taking a lease

(1) Rex *v.* Fillongley, 1 Term Rep. 458. Also Rex *v.* Netherseal, 4 Term Rep. 258. post. Rex *v.* Culmstock, 6 Term Rep. 730. post. Rex *v.* Aldborough, 1 East, 597. post.

(2) But see post. and the opinion of Lord Kenyon, Ch. J. Rex *v.* South Lynn, 5 Term Rep. 667.

(3) Rex *v.* St. Michael's in Coventry, 15 East, 567.

(4) See ante, p. 4. (1).

(5) Cranley *v.* St. Mary's Guilford, 1 Stra. 502.

(6) Per Eyre, J. Ibid.

(7) Rex *v.* Littledean, 1 Stra. 555.

by

by parol for seven years would confer a settlement, as being void for the whole time, by the statute of frauds(1). But this opinion was ill founded, for the act declares, that such leases shall have the force and effect of leases at will, which we have already seen will confer a settlement; and it has been decided, that a parol lease for more than three years enures as a tenancy from year to year, for that which was considered as a tenancy at will, when the statute passed, has since been properly construed to enure as a tenancy from year to year. (2)

This seems to be the only circumstance in which the law respecting settlements of certificated persons, under 9 & 10 W. III. c. 11., by occupying a tenement in the certified parish, differs from that which applies to those which may be acquired by virtue of 13 & 14 Car. II. They conform to the same rules in all other respects, and the decisions which have obtained in one of these classes of settlement, may be considered as authorities applicable to the other. (3)

In considering this species of settlement, it is necessary to examine, 1st, What is a tenement within the meaning of the act. 2d, Its value. 3d, The occupation, or coming to settle thereon. 4th, The residence. 5th, The proofs necessary to support the settlement.

(1) 29 Car. II. c. 3. s. 1.

(2) Clayton *v.* Blakely, 8 Term Rep. 3. and see Doe ex dem. Rigge *v.* Bell, 5 Term Rep. 471.

(3) See Ivinghoe *v.* Stonebridge, 1 Str. 265. where the certificated man purchased an estate, post.

SECT. II.

Of the Kind of Tenement; and herein, *of uniting them.*

Division of subject.

THE consideration of what shall be considered a tenement upon which a person can come to settle, admits of a two-fold division. 1st, What sort, or kind of things are comprehended within the term tenement. 2d, How far the tenement must be situated within the parish where the settlement is claimed, and whether two or more, when occupied together, come within the meaning of that term as applied in 13 & 14 Car. II. c. 12.

Tenements, what.

1st, As to the several sorts, or kinds of things real, comprehended under the word tenement, Sir William Blackstone observes, that,

" *Land* comprehends all things of a permanent substantial nature; being a word of very extensive signification. Tenement is a word of still greater extent, and though in its vulgar acceptation, it is only applied to houses, and other buildings, yet in its original, proper, and legal sense, it signifies any thing that may be *holden*; provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus, *liberum tenementum*, frank tenement, or freehold, is applicable, not only to lands, or rather solid objects, but also to offices, rents, common, and the like: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements." (1)

(1) 2 Black. Com. Book ii. chap. ii. p. 16. and see the opinion of Lord Kenyon, C. J. post. 13., that " any thing is a tenement which is a profit out of the land."

How used in 13 & 14 C. II. c. 12.

The legislature seem to have used the word in 13 & 14 Car. II. in what the learned judge just quoted calls the vulgar sense, and to have intended it to signify houses and buildings, in which persons could come to dwell and settle. (1)

Parts of houses.

Part of a house is a tenement, in this limited sense of the word. Thus a first and second floor unfurnished, there being only one door, and one staircase (2); a shop communicating with the house, but occupied separately (3), have been held tenements.

Soon obtained a more extended construction.

But the term obtained a more extended construction owing to the received opinion, that the ability to pay 10*l.* *per annum* is the foundation of the settlement, and whether the party pay it for a house for his habitation, or any other tenement, which brings him in a profit, is not material. (4)

Tenements within the act. Water-mill, &c.

It has been held therefore, that a water-mill (5) and a wind-mill, although it had no house, or place of residence (6), are tenements which confer a settlement. So also a rabbit-warren, with a cottage upon it (7), although the tenant have no right in the soil of the warren, except that of entering upon, and killing the rabbits there (8), is a tenement.

Landsale colliery.

So a land-sale colliery, *i. e.* not the mine only, but the stock of horses, gins, ropes, and other things ne-

(1) See Rex *v.* Hollington, 3 East, 113.

(2) Rex *v.* St. George's Hanover-Square, Burr. S. C. 69[illegible]; and in Rex *v.* Whitechapel, a furnished room was held a tenement. 2 Bott, 100. Pl. 146. But as to the value of the furniture see post.

(3) Rex *v.* St. Giles's in the Fields, Burr. S. C. 798.

(4) Kinver *v.* Stone, 1 Str. 678.

(5) Evelyn *v.* Renrcomb, 2 Salk. 536.

(6) Rex *v.* Butley, Burr. S. C. 107. Rex *v.* Knighton, 2 Term Rep. 48. post.

(7) Kinver *v.* Stone, ante, (4).

(8) Rex *v.* Piddletreathide, 3 Term Rep. 772.

cessary

cessary for working, is a tenement within the statute, provided the mine, and engines affixed to the soil, are of the annual value of 10l.(1) So are the tolls of a market(2), as also tithes(3). And not only land(4) but a limited interest in its profits are tenements; such is the grass and aftermath of a meadow, taken for ten months(5). The fogs, or after-grass of a field, taken without specification of the time in which they are to be uplifted; these give a settlement if occupied forty days.(6)

Limited profits in land.

So also, where a party held under a parol agreement the fishing of a pond, with the grates, &c. also all the spear, sedge, flags, and rushes, growing in, and about the said pond; "he held a tenement; for the court will consider, that the fishery and soil passed together." Buller, J. "The fact of letting a fishery is sufficient, and we must presume, that the soil passed along with it; though I am by no means ready to allow, that if it had been any other kind of fishery, it would not have given a settlement.(7)

Fishing of a pond, &c.

although the soil don't pass.

A cattle-gate in a stinted pasture is a tenement, for it passes by lease and release, and cannot be devised but by the statute of frauds(8): As is the going of so many head of cattle in a certain common, for it is a common in gross, which is a matter of tenure. Lord Coke says, that a præcipe will lie for it.(9)

Cattle-gate, &c.

(1) Rex *v.* North Bedburn, Cald. 452.

(2) Rex *v.* Chipping Norton, 5 East, 239. where the court inclined strongly to the opinion on the authority of Lord Coke; Co. Lit. 19. b. Webb's case, 8 Co. 466. The opinion of Lord Kenyon, Rex *v.* Piddletrenthide, 3 Term Rep. 755.

(3) Rex *v.* Skingle, 1 Str. 100. Powell *v.* Bull, Com. Rep. 267.

(4) Rex *v.* Shenstone, Burr. S. C. 474.

(5) Rex *v.* Stoke, 2 Term. Rep. 451.

(6) Rex *v.* Brampton, 4 Term Rep 348. But this was once doubted; see Rex *v.* Minchinghampton, 2 Str. 874. and the opinion of Wright, J. Rex *v.* Lockoley, Burr S. C. 318.

(7) Rex *v.* Old Alresford, 1 Term Rep. 358.

(8) Rex *v.* Whixley, 1 Term Rep. 137.

(9) Rex *v.* Dersingham, 7 Term Rep. 671.

But

Tenement must be of a permanent nature.

But as a tenement must be of a permanent nature, doubts have arisen whether particular lettings, although connected with the profits of land, were not rather contracts for the occupation of personal chattels, than a demise of the produce of land.

Master of job-horses renting a stable from his employer.

John Small contracted with the pauper's father to supply him S. with a pair of coach horses for a quarter of a year at 22l., and the father contracted with Small for a stable belonging to Small, and was to pay 2l. 10s. a quarter for it, Small reserving a separate stable for his own use. At the latter end of the fifth quarter, Small threatened to discharge him, but, on the importunity of friends, agreed that he should continue to furnish him with the pair of horses at 20l. only, having the like quarterly allowance for the use of his stables as before. They acted under this contract for several years, till the pauper's father died; who, during the whole time, rented and lived in a tenement of 6l. a year in the parish, but was never rated either for the house or stables. It was contended that th[illegible] was [illegible] an independent [illegible] for the stable, but a deduction from the price of the job-horses, on account of their standing in Small's own stables; and that no rent would be payable when the job was at an end. But the court, after taking time to consider, thought the agreement, though awkwardly penned, was a contract for the stable. Mr. J. Aston. "There can be no doubt but that it is a good renting; suppose the master had paid the servant his whole wages, might not he have brought an action for the occupation and use of the stable?(1)

Renting a dairy.

M. covenanted with E. to let and demise to him for a year, a dairy consisting of sixteen cows, with the dwelling-house, and feeding for the said cows, on twenty-one acres of clover ground, and thirteen acres of meadow land,

(1) Rex *v.* St. Margaret, Fish-Street-Hill, Burr. S. C. 677.

with

with the after-leaze of a mead; also the run of the yard and arshes belonging to the farm, for feeding pigs, and the run of a horse with the cows. Also to allow him the sherl wheat arising from the corn growing on the farm, and provide for the cattle, when wanted, five tons of hay, and cause ten acres of the clover, and thirteen of the meadow, to be laid up at Candlemas, and the other eleven acres of clover at Lady-day: to put the house in repair, &c.; and if any of the cows shall not calve before the first of May, the landlord to allow two shillings *per* week out of the rent for each cow until she is delivered, and what is reasonable for every calf wanting. The tenant to pay 3l. 5s. for every cow.

The court were of opinion, that this was not a tenement within the statute. "It is only an agreement for the use of the cows, and the feeding of them; and it is merely personal. Here is no interest in the land that passes, or was intended to pass."(1)

But this decision was at first questioned, and has since been over-ruled.

The pauper rented in Chaldon Herring a dairy of thirty cows, some at 5l. 10s. and others at 5l. a cow, with liberty to cut furze on parts of the farm for the use of the dairy only, and a warren to kill rabbits for his profit, called Grange warren, and a small house on it to keep nets in the same parish, of the same man, at 30l. per annum. The cows were to feed on particular grounds, at particular seasons of the year, as is usual in the letting of dairies. The pauper and his man sometimes slept in the house in Grange warren. The pauper had no right in the soil of the warren, except that of entering upon, and killing rabbits there; the person of whom he rented

Renting a dairy of cows to be fed in particular pastures.

(1) Rex *v.* Lockerly, Burr. S. C. 315. absente Lee, C. J.

the

the warren constantly depasturing the same, and ploughing some part thereof. Lord Kenyon, C. J.—"If we were now called upon for the first time to make a decision upon this statute, perhaps I should have some difficuly on the subject; but the courts have put a liberal construction on it. I cannot quite agree with the determination of Rex *v.* Lockerly, because, after it had been decided in so many cases, that an incorporeal hereditament would give a settlement, I should have thought that that case would have received a different determination. But without considering that case, I think that the pauper took a tenement in Chaldon Herring, both by renting the dairy and the warren. Lord Coke says, that *prima tonsura* is a tenement; then the dairy was a tenement; the other taking was also sufficient; for it was, if I may use the expression, a pernancy of the profits of the land, by the mouths of the rabbits. A free warren is the subject of a family settlement; a præcipe will lie for it, and the renting of it is sufficient to give a settlement." (1)

Renting a dairy, &c.

And in a later case, Rex *v.* Lockerly was expressly over-ruled. The pauper rented of Chapman, under a verbal agreement, twenty cows (being part of the stock of his farm), at 3l. 10s. a cow *per annum*. It was also agreed, as is usual in such contracts in the county of Dorset, that the owner of the cows should feed and support them; and for the purpose of doing so in the best manner, that such cows should depasture in certain lands, called the Cow Leeze Grounds, from May-day to the 18th of September, and after that time in certain meadow grounds, which are kept for that purpose, from the time they are mowed; and when the pasture of the meadow grounds were consumed, that the cows should be kept by

(1) Rex *v.* Piddletrenthide, 3 Term Rep. 772.

Chapman

Chapman in some other of the farm grounds, with the other cattle, or be foddered in the farm-yard with hay by him. The land called the Cow Leeze was to be laid up by Chapman at Lady-day, and not fed upon by any cattle whatsoever until May-day. Chapman was not to feed any other cattle, either in the Cow Leeze, or meadow grounds, whilst the same were fed by the cows rented by the pauper; but the hay of the meadow grounds was taken by Chapman, and the Cow Leeze ground fed by him after the cows had quitted it. If any cow did not calve before May-day, or died, or became barren, or sick, an allowance was to be made. The pauper was not bound to repair any fence in any ground in which the cows were fed. It was further agreed, that the pauper should have a dwelling-house, and a right of feeding a mare on the farm, keeping his pigs in the yard, and cutting fuel for the use of the dairy; but he had no other right whatever. The contract continued in force five years, during which time the pauper resided in the said house on the farm. Lord Kenyon, Ch. J.—"It being impossible to distinguish this case from Rex *v.* Lockerly, I think we are bound to deny the authority of that case, and to substitute, in its room, a better exposition of the statute of Car. II. It has been argued, that if we decide this to be a tenement, we shall depart from the words of the statute; but, in this case, the pauper took a tenement; emphatically, a tenement. *Any thing is a tenement, which is a profit out of land.* In order to take a tenement, it is not necessary that the party should have a fee simple, or fee tail; any minute interest in land is *parcel* of a tenement. Such minute interest, indeed, cannot be entailed, but all the parcels, when consolidated together, may."

"A beastgate has been held to be a tenement; and yet that is not the whole land, but the profits of the land to a certain amount. So here the profits of these lands are to be taken exclusively by the cows which the pauper rented. If the cattle had been his own, and he had rented

rented the feeding of them, that would unquestionably have been a tenement; like the taking of the pasture, the hay, and aftermath: and I think that these cows were the pauper's for a certain period: they were not so far his own that he could have sold them, but they were his, that he might use them under the contract for a limited time. And this was *not the less taking a tenement, because the pauper could only enjoy the land in a particular mode*; for in many farms the tenant stipulates, that he will not depasture sheep or horses on particular grounds. I do not see, therefore, why this is not, strictly speaking, a tenement; for the pauper had, for a certain part of the year, the exclusive right to the pasturage of these grounds, to be taken by the mouths of the cattle." The other judges concurred. Buller J. adding, "By the very terms of the contract, no other cattle, not even those of the farmer himself, were to be fed on those particular grounds on which the pauper's cows were to depasture; wherefore he had the exclusive possession of these fields during that time. This goes a great way to answer the difficulty stated at the bar; for as, at present, it seems to me, that if the pauper had the sole possession, or, which is the same thing, the sole profits, he might have maintained trespass."(1)

And in conformity to what was thus observed by Mr. J. Buller, leases of this sort have been held such a demise of the soil and exclusive use of all the grass (that should grow on the closes, particularly enumerated in the lease) to be taken by the mouths of the cattle, as to entitle the tenant to bring trespass, or distrain any other cattle of the lessor for doing damage there.(2)

The right to the herbage need not be exclusive.

In the foregoing cases, there was a demise in effect of the exclusive right to the herbage and produce of the soil

(1) Rex v. Tolpuddle, 4 Term Rep. 671.

(2) Burt v. Moor, 5 Term Rep. 329.

for

for a limited period. But a right to take the herbage by these means, in common with other persons, and that whether the cows belong to the party, or are hired for the purpose, is equally a tenement within the statute.

Renting a dairy in a common pasture.

The pauper, during the time he occupied a house of the annual value of 5l. rented the ley of two cows from May-day to Michaelmas, at six guineas, in a large pasture, containing one hundred acres, and of the annual value of 250l. belonging to Mr. Mundy. The pauper had not the exclusive pasture of the land, and Mr. M. was under no restriction as to what cows he kept in it. Lord Ellenborough, C. J.—" The present case is nothing more than a common in gross, which has been holden to be a tenement within the statute (1)." Lawrence J.—" In Rex *v.* Piddletrenthide (2), Mr. Justice Buller states, that the question, in cases like the present, is this, whether or not it be *a contract to receive profits out of land?* If that be so, it determines this case; for here the cows were the pauper's own, and the contract which was for the pasturage of them was, to use the words of Lord Kenyon in the same case, a contract for the pernancy of the profits of the land, by the mouths of the cattle." (3)

Privilege of milking a cow to be depastured.

The pauper under a verbal agreement rented and paid for the hire and privilege of milking two cows belonging to R. at 5s. 6d. per week each cow, for 40 successive weeks, and the cows were by the terms of the agreement to be depastured by R. on his farm at Norton, in common with his other cows; and were depastured on such lands of the farm as R. thought proper. The pauper never went on the lands to fetch them, but they were

(1) Rex *v.* Dersingham, ante, 9. (9).

(2) Ante, 12. (1).

(3) Rex *v.* Hollington, 3 East, 113.

brought

brought up to the fold with the other cows of R. to the fold yard. Lord Ellenborough C. J.—There is no solid distinction between R. *v.* Hollingworth and this.—There the pauper had only hired the depasturing of his own cows, in common with the cattle of the owner, on certain land: Here he hired the cows themselves, which for this purpose are the same as his own, together with their depasturing in common with the owner's other cattle upon a certain farm, all included in one contract. If the cows had been the pauper's own, this case would have been identically the same as the former; but that fact was no material ingredient in the former case; for the cows are his own for the time he hires them. (1)

Joint privilege, &c.

The pauper for two years resided in a house and occupied a garden in D. of the annual value of 8l. 18s. and during the whole time he and one J. M. jointly hired the milking of a cow in the following manner:—The pauper applied to E. at whose factory he and M. worked, for the milking of a cow betwixt them. E. referred the pauper to his agent H. to agree for the cow, and H. agreed they should have the cow for the season for 9l. The particular cow was pointed out, and was at that time upon a large farm occupied by E. Nothing was said as to how or where the cow should be fed, more than H. said that E.'s farming man would inform the pauper on what pasture the cow would be fed and milked, and he did inform him, and so from time to time when the pasture was changed, that he might know where to go to milk her. The cow was grazed on E.'s pasture on the same farm for the whole of the two seasons, with other cows which were let in the same way to other workmen of E.'s, and with other cattle belonging to him. The pauper and his partner always milked the cow during the whole of four successive seasons, and they were always grazed on E.'s

(1) Rex *v.* Stoke upon Trent, 10 East, 496.

farm

farm in the same way. Her summer pasturage was of the value of 5l. for each season. The court were of opinion that the value of 10l. necessary to enforce a settlement was made up by the contract which the pauper entered into for hiring the milking of a cow in the manner stated. It was a contract for the milking of a cow which should be pasture-fed during the season, either upon land of the farm in the parish where the parties contracted and were residing, or at least within a convenient distance of it, in order that the pauper might have a convenient opportunity to milk the cow. It was to be understood that when the cow was to be milked on pasture ground that she was also to be fed there. Nothing could be meant by changing the pasture but for the purpose of her being fed on fresh pasture. If the owner had fed the cow on dry food or grains instead of pasture, it would have been a breach of the contract. (1)

But to constitute a tenement, there must be a profit issuing out of the land itself. A contract to feed cows generally, under which they might be fed with green tares bought in the market, would not be a tenement within the act. (2)

Also a right to the enjoyment of a local privilege or franchise does not constitute a tenement, or render the party irremovable, so as to confer a settlement.

A case found that the town of Alnwick is an ancient borough, and the freemen of Alnwick are a body corporate by prescription, by the name of the chamberlains, Freeman's right of common.

(1) Rex *v.* Darley Abbey, 14 East, 280.

(2) Per Lawrence, J. Rex *v.* Tisbury, Mich. 45 Geo. III. with which Lord Ellenborough C. J. thus agrees, "If indeed the cow might under this contract have been fed elsewhere on grain or hay, the consequence would follow that this was not a taking of a tenement." Rex *v.* Darley Abbey, 14 East, 282.

common council, and freemen of Alnwick. The freedom of the town is acquired by descent or servitude, or is granted upon the recommendation of the common council. F. the pauper is a freeman by descent, and had been admitted to his freedom twenty-five years before the order of removal. The Duke of Northumberland is Lord of the manor and borough of Alnwick, and the forest of Haydon or Alnwick, or Alnwick Moor, lies within the manor; the soil and royalties being vested in the lord. The pasturage of the moor is of considerable value, and the freemen of Alnwick, and no others, are entitled to common of pasture thereon; each freeman being entitled, when resident, but not otherwise, to the pasturage of stints of his own cattle, that is to say, five cows, or twenty-five sheep. The freemen have also a right to dig and cut peats, furzes, and bushes, upon Alnwick Moor, for their own use, and to get limestones, slates, and freestones in the open quarries of that moor; they have the privilege also of setting up their stalls in the market place, without paying any toll or stallage to the lord, and of having their children educated free of expence at the town school, at which school two of the children named in the order were placed at the time of the removal. The question stated for the consideration of the court was, whether the rights of the pauper, as a freeman of the borough of Alnwick, amount to such an estate as he is not legally removable from under the statute 13 & 14 Car. II. ch. 12.

Grose J. (1) I confess I felt some astonishment when I read this case, and could not conceive on what grounds it could be contended that the pauper gained a settlement in Alnwick. The question is, whether he was a person removable from his own estate? But what estate had

(1) Lord Ellenborough C. J. was absent.

he?

e? He had neither land nor house. But then it is said he had a right of common;—it does not, however, appear that he had any cattle wherewith to exercise that right. The profit *a prendre* or easement never existed: how then can he be said to have been resident on his own? In truth, it cannot be considered as a residence on his own estate sufficient to confer a settlement. It would be ridiculous and absurd so to consider it.

Le Blanc, J.—The question is whether it appears to us that the pauper was irremovable during any period of his residence in the town of Alnwick, on the ground of being resident on his own estate. The argument is, that he was residing on his own, because he was a freeman of Alnwick, and as such entitled to a right of common on Alnwick Moor; and this right of common is said to be a tenement. But I think this is not in strictness a right of common, nor can it properly be said to be a tenement; it is a mere franchise. The argument, however, has gone the length of contending that suppose it to be a franchise, still the pauper was not removable from it. But to this I do not accede? In the case of a freeman of a corporation having a right of voting for the election of the mayor, or any other officers belonging to the corporate body, has it ever been decided that such a person was irremovable in respect of such privilege? Here the pauper as a freeman, if he had any cattle, was intitled to turn them on the moor. This, however, was a mere personal privilege, wholly unalienable and not falling within the legal definition of a right of common. Such a privilege has never yet been holden to be a tenement so as a person could be said to be removable from it as from his own. It is a strong circumstance that notwithstanding the existence of such rights in different parts of the kingdom, no attempt like the present has hitherto been

 made.

made. It appears to me, therefore, that this does not fall within the purview of those cases which have decided that a party is not removable from his own, and which doctrine, I admit, has been extended to cases where a party was merely residing in the parish in which his estate was situate, and not upon the estate itself. (1)

Bayley, J.—The case does not find that the pauper had any home. A freeman as such has no right of residence; that must be acquired by other means. Where he can obtain a residence, there as freeman he is entitled during such residence to have cattle on the common. But when he removes, he loses this right. I am not aware of any case, in which a privilege of this description has been holden to be sufficient to confer a settlement. It is a mere local privilege, and attached to the person so long only as he is resident. From the frequency of these rights in all corporations in the kingdom, settlements must have been claimed in respect of them, had they been deemed sufficient for that purpose. This case is very different from the cases of removal from landed property. (2)

Contract for use of machinery connected with a tenement.

Upon the same principle a contract, whether annual or otherwise, for the use of machinery affixed to a tenement, is not within the statute, although connected with a limited use of the building by a right of working therein, or even with an exclusive occupation of part thereof, if such part is not of the annual value of ten pounds.

(1) Rex *v.* Houghton-le-Spring, 1 East, 247.

(2) Rex *v.* Warkworth, East. 53 Geo. III. Maule and Selw. MSS.

The

The pauper entered into an agreement, under seal, with B. the owner of a corn-mill, whereby he covenanted with B. that he would, with horses and carriages, at his own costs and charges, from 25th September 1790, to 25th March 1795, deliver, at the corn-mill belonging to B. weekly, and every week, three loads and an half of wheat, at the least, and at his own costs and charges grind the same into flour, and pay to B. for the same eight shillings a load, at times stated in the agreement. B. covenanted, that the pauper, during the continuance of the articles, should have the use and liberty of running and grazing for his horses on a certain meadow therein described, and also the use and liberty of the stable and cart-house for his horses and cart, without paying any thing for them. B. further covenanted, that he would, at the expiration of the articles, again take all and singular the utensils belonging to the corn-mill at a fair appraisement, and pay the pauper the sum they should be appraised at. The pauper ground corn at the mill for two or three years; he never resided thereon during the time, but in a cottage in the parish, which he rented at 3l. 18s. *per annum*. The counsel abandoned the case; the court being clearly of opinion, that there was no colour to construe this agreement into the taking of a tenement. (1)

Renting the grinding of so many loads of corn.

The pauper, by trade a needle-maker, worked for Webb in that trade, at six pointing places in his mill, and afterwards Webb, not having, in general, use for more than four of them, he rented of Webb two of the pointing places for more than a year, at the yearly rent of 16l. But he was to do all Webb's work in preference to that of any other person, although to do it, it might be necessary to use all the six pointing places. No two particular pointing places were let to the pauper, but he might

Renting pointing places in a mill, no tenement.

(1) Rex *v.* Hammersmith, 8 Term Rep. 450, n.

 have

have the use of any two he pleased; but work, or no work, Webb was entitled to his rent of 16l. a year for them. The pointing places are frames of wood, which support the spindles, on which grinding stones turn, which are moved with great velocity by means of leathern straps communicating with the great wheel of the mill, which is turned by water. The pointing places are placed on the floor of the room, and at each of them a man sits, and the needles are pointed, by being pressed against the grinding stones. The pauper did not rent any room in the mill, nor any other part of it, but the two pointing places. The court said, there was no pretence for calling this agreement, to work in a mill, the taking of a tenement, and that it was like Rex *v.* Hammersmith. (1)

The exclusive use of runners for scouring needles, &c. a packetting room at 1s. per packet, no tenement.

The pauper rented three runners, for scouring needles in a mill, belonging to Milward, and a packetting room, at the rent of one shilling per packet, for every packet of needles scoured thereat. A runner consists of two pieces of wood, each about five feet long, and eighteen inches broad: one of them is fixed with screws to the floor of the mill, which may be unscrewed, and removed at pleasure; the other is moved upon it horizontally, backwards and forwards, by means of a piece of timber fixed thereto at one end thereof, and which communicates at the other with the wheel of the mill: and between these pieces of wood, needles are scoured with oil and emery dust. In mills of this description, there are usually in the same place several different runners, worked by different workmen; but when the pauper took the three runners, they were divided by a partition from the other runners in the same mill, but the partition being found to take up too much room, was removed, and the pauper slept in the mill with his family for two years. He at first worked

(1) Rex *v.* Dodderhill, 8 Term Rep. 449.

for

for Milward only, and afterwards for other masters, M. not having sufficient employ for him. No other workmen had any right to use the runners rented by the pauper without his consent, but he had the exclusive right to use them and the packetting room, The rent which he paid for the runners, and a cottage, amounted to more than 10l. *per annum.* It was endeavoured to distinguish this from the foregoing case. As the pauper had an exclusive possession of the particular runners, as well as of the packetting room with which the runners were connected, thereby adding to the value of the packetting-room, which no doubt was a tenement. The pauper's family slept there for a time. Altogether, therefore, it was a taking of part of the mill. Lord Kenyon, C. J.—There is no distinguishing this from the case of the King *v.* Dodderhill (1). A runner is no more a tenement, than a pointing place is so. It might as well be said to be a taking of a tenement, if a man contracted to pound in a certain mortar, or to use a particular grinding stone in a mill. It is not, in effect, the taking of a part of the mill as a tenant, but a licence to use a particular part of the machinery of it for the purpose of manufacture, and no other purpose. (2)

A standing-place in a mill for a carding machine, no tenement.

Lastly, the pauper took from the owner of a mill, worked by a steam engine, a *standing place* in a room for a carding machine of his own, which was worked by the machinery of the steam engine, and fastened to the floor, and the roof of the room. He was to pay his landlord 20l. a year, and agreed with him, that each of them should give the other three months' notice to quit. Other tenants had carding machines in the same room, on similar terms, and they, as well as the owner of the mill, were respectively furnished with keys. This was held not to be a tenement upon the authority of the foregoing

(1) Ante, 22. (2) Rex *v.* Tardebigg, 1 East, 528.

 cases

cases. Lawrence, J.—This case is governed by those of Rex *v.* Dodderhill, and Rex *v.* Tardebigg, from which it has been endeavoured to distinguish it, by saying, that those were only licences to use certain machines belonging to the owners of the mills; whereas this is a hiring of part of the mill itself; because it cannot be supposed that the pauper contracted for a licence to use his own machine. But it is to be observed, that the contract here is not pretended to be for the use of the pauper's own machine, but for a licence to make use of the steam engine of the mill by applying it to his own machine. Now what difference can there be, between a licence to use another's machine, and a licence to apply the party's own machine to the machinery of another's mill? But it is said, that the pauper contracted for the standing place in the room where the machinery was to be put. To be sure he must have a place to stand to work the machine, otherwise the contract would be absurd, and nugatory: but how does that differ from a general licence for him to use the machinery there? Therefore, on this plain ground, that the contract was for a mere licence for the pauper to use the machinery of the mill, and not a letting of any part of the mill itself, I am of opinion, that no settlement was gained by renting it." Le Blanc, J. "The substance of the contract was for the use of the machinery, and not a hiring of any part of the room in the mill. It was a hiring of the use of the mill-owner's machinery, as in the other cases referred to; with this difference, that instead of using the owner's machine, he was to apply his own machine to the moving power of the mill; in order to enable him to work it with facility. (1)

2. Situation of tenement in different parishes.

2d, As to how far the settlement is affected by the local situation of the tenement, with the reference to the

(1) Rex *v.* Miller, 2 East, 189.

parish in which the settlement is sought, or whether two or more when occupied together come within the meaning of a tenement under 13 & 14 Car. II. c. 12.

One tenement in different parishes.

It is decided, that an entire tenement of the annual value of 10l. and upwards may be situated in different parishes. In this case, it confers a settlement where the occupier resides, although he has not the value of 10l. a-year in either (1), or less than 10l. in the place of residence, and considerably more in the adjoining parish. (2)

Ground of the determination.

These determinations proceed upon the idea, that the settlement is founded upon the tenant's ability, which is to be measured by the value of what he occupies, wherever situated. "For the law presumes, that a person capable to be entrusted with the management of 10l. *per annum*, is not likely to become chargeable, but is able to maintain himself." (3)

Different tenements in the same, or different parishes.

A person may likewise occupy at the same time, two or more tenements, situate in the same, or in different parishes. It seems to have been once thought that the tenement must be entire, to confer a settlement. (4)

But it is now settled, upon the principle already mentioned, that distinct tenements, when of sufficient conjunct value, are within the 13 & 14 Car. II., and that, whether situated in the same (5), or in different pa-

(1) South Sydenham *v.* Lamerton, 1 Str. 57. St. John's *v.* Amwell, 1 Str. 529. Elsted *v.* Holliburne, 2 Str. 849.

(2) Rex *v.* Stapleford, 2 Bott. 114. Pl. 159. But the tenements were distinct in this case.

(3) Per Parker C. J. South Sydenham *v.* Lamerton, ante, (1). See also Rex *v.* Sandwich, post. 26. (3).

(4) See the opinion of Parker C. J. ante, (3).

(5) North Nibley *v.* Wooton-under-Edge, Fol. 79.

rishes,

rishes (1), or taken at different times (2), and of different landlords (3), or held by distinct titles, as by renting part, and holding part in right of a wife (4); residing in a tenement in one parish, of which possession was obtained under a treaty to purchase, and occupying his own freehold property in another (5); they give a settlement. Also it makes no difference, if the tenements are of distinct kinds, as a house, a meadow, and a cattlegate (6), a messuage, and the aftermath of a meadow (7). No more is necessary but that the party should be a lawful occupier to the yearly value of 10l. during a residence of forty days. (8)

But the party must actually occupy the premises sought to be united; for an occupation as tenant in one parish cannot be coupled with an interest as landlord in another.

Demised freehold don't unite with occupied leasehold.

The pauper resided in F. in a house of the value of 8l. 8s. *per annum*, and during his residence there had a freehold estate in S. which he had let at 2l. 10s. a-year; He did not gain a settlement, for the words of the statute are "come to settle in any tenement," which have been sufficiently departed from already, when it was decided that if a person take a tenement of the value of 10l. a-year, and underlet a part, he will thereby gain a settlement; but the ground of that decision was, that he had credit to be trusted with 10l. a-year. Here the

(1) Rex *v.* Sandwich, Burr. S. C. 44. and it is sufficient also to avoid a certificate, Rex *v.* Stapleford, 2 Bott, 3 Ed. 214. Rex *v.* Bowling, Burr. S. C. 177. Hertford *v.* Amwell, 1 Stra. 529.

(2) Ib. and Rex *v.* Newnham, Burr. S. C. 176. post. 49.

(3) Ib.

(4) Rex *v.* Donnington, Burr. S. C. 744.

(5) Rex *v.* Culmstock, 6 Term Rep. 730.

(6) Rex *v.* Whixley, ante, 9.

(7) Rex *v.* Stoke, ante, 9. and various other cases.

(8) See the opinion of Grose, J. Rex *v.* Hooe, 4 East, 368.

pauper

pauper has only credit for a less sum, *viz.* eight guineas. But it is said, he had property of his own elsewhere; of that, however, he was not the occupier. It is sufficient to say that the cases (1) cited are not like the present, and that there is no case which seems to have gone the length contended for. (2)

By the 13 Geo. III. c. 84. sect. 56. no gate-keeper of any turnpike road, or person renting the tolls thereof, and residing in any toll house belonging to the trustees of the road, shall *thereby* gain a settlement in any parish or place whatsoever. (3) 13 Geo. III. c. 84. Gate-keeper or toll-renter.

This means, that no person of this description shall gain a settlement by keeping the gate, or renting the tolls, and residing in the toll house; it does not prevent him from acquiring a settlement by renting a tenement, in itself worth above 10l. a-year, and situated in the same parish where the gate is. (4)

(1) Rex *v.* Culmstock, ante, 26. (5). Rex *v.* Donnington, ante, 26. (4).

(2) Rex *v.* South Bemfleet, 1 Maule and Selw. 154.

(3) The 30 Geo. III. passed for paving, lighting, watching, and regulating the streets of Durham, as also for widening the streets and regulating the markets; and commissioners were thereby appointed and empowered to appoint persons to collect tolls for carrying the above purposes into effect, either in the streets of D., or if it should appear more expedient, to erect two turnpikes and toll houses, for the purpose of collecting them, on the great northern road. A turnpike gate and toll house being erected on the road, under this clause, it was contended, that the lessee acquired a settlement by residence, notwithstanding 13 Geo. III. c. 84. sect. 56. the tolls being collected under a local act, for various local purposes, and not for the repair of turnpike roads, to which that clause was confined. But *per Curiam*, There is no difference in effect, though the appellation of turnpike road does not occur in the local act; the one is a stone, and the other a gravel road: and every character belonging to a turnpike road belongs to this. The commissioners are trustees for the repair of the roads, and the case is within the prohibition of the general turnpike act. Rex *v.* Elvet, 11 East, 93.

(4) Rex *v.* Denbigh, Trin. 44 Geo. III, 5 East, 333.

SECT.

SECT. III.

Of the Value of the Tenement.

Settlement depends on value of tenement.

THE settlement depends upon the tenement's being of the annual value of 10l. and not upon the amount of the rent, where rent is paid. "If a man hire a house at a small rent, and pay a fine, yet, if the house be worth 10l. *per annum*, it makes a settlement." (1)

Value how estimated.

But rent is the fair criterion of value, unless the tenement is shown to be worth more or less; and the annual value is alone material(2). If it be worth 10l. a-year, and a tenant occupy five months, paying 4l. he gains a settlement (3). And the value may be calculated without deducting taxes, rates and charges, usually deemed tenants' taxes. (4)

Neither

(1) Per Parker, C. J. South Sydenham *v.* Lamerton, 2 Bott, 128. Pl. 171. Ib. 112. Pl. 156. S.C. Per Page, J. Rex *v.* Yokeford, Burr. S. C. 140. Per Aston, J. Rex *v.* Llandverras, Burr. S. C. 571.

(2) Rex *v.* Tissington, Burr. S. C. 499. Rex *v.* Yokeford, ante, (1). Et vide Rex *v.* Bilsdale, Kirkham, 2 Bott, 136. Pl. 183.

(3) Rex *v.* St. Botolph's. Burr. S. C. 574.

(4) Rex *v.* Framlingham, Burr. S. C. 748; where the pauper, being certificated, took a public house, &c. at the yearly rent of 10l., payable half-yearly; and it was agreed, that the landlord should pay all parish rates and charges; and it was further stated, that in case the tenant had paid the parish rates, the landlord would not have expected to be paid, nor would the tenant have consented to pay the said yearly rent of 10l. for the premises. This was held, taking a tenement of the yearly value of 10l., within the intention and meaning of the act of parliament: for it turns upon the credit given, and here the credit is given to the man for 10l. a-year. The annual value of the tenement, independant of the parish rates, was not found otherwise than as is before set forth. But the counsel on both sides,

[Wallace

Neither is the worth at the time when the tenant enters material, provided it is sufficient during any year of his occupation (1), and the manner in which it becomes of that value is equally immaterial.

Value sufficient if during occupation.

A pauper while he rented a cottage and garden in S. of the annual value of 4l. held land in T. for one year, at the rent of 6l. 10s. It had been cropped by the landlord with clover and grass seeds previous to the letting, and was in consequence thereof worth 6l. 10s. for that year, but if it had not been so cropped, it would have been worth only 2l. 5s. He gained a settlement.—For he occupied a tenement which during that year was in fact of the value of 10l., and how it became so is immaterial. (2)

But it must be actually worth 10l.; a mere speculative, or potential value does not satisfy the statute. A house was taken at 10l. a-year, and the landlord covenanted by the lease to make certain improvements. The sessions found, that the improvements were not made during the tenant's occupation, and that the house in its present state was worth only 6l. 10s.: but if the improvements had been made, "it might have been worth 10l." The

Speculative value insufficient.

[Wallace and Dunning,] argued upon the supposition, that the annual value of the tenement, deducting the taxes, was less than 10l. This was the case of settlement gained by a certificated person, by taking a lease of a tenement of the yearly value of 10l. within 9 & 10 W. III, c. 11. The point has since been expressly decided upon the authority of this foregoing case. The Court observing that it having been settled nearly 40 years ago in Rex *v.* Framlingham, that the rent reserved (all fraud apart) is to be taken as the criterion of the value of the tenement, without reference to the payment of the rates and taxes by the landlord; they were not at liberty to disturb that opinion by any speculative opinion. The tenant may be said to obtain credit for a tenement, in one sense, of the yearly value of 10l., and the decision is not so directly against the words of the act, as to be necessarily wrong. Rex *v.* St. Paul's, Deptford, 13 East, 320.

(1) Rex. *v.* Bilsdale Kirkham, ante, 28. (2). which seems to have been a tenancy from year to year; and is in law a new demise for each year.

(2) Rex *v.* Purley, 16 East, 126.

tenant

tenant gains no settlement. The value must be estimated, as at the time of the letting, or at the time of the removal; and it is only of the value of 6l. 10s. at both. (1)

Must be exclusive of personal chattels.

Nothing is to be considered but the worth of the tenement itself, without reference to that of any personal chattels upon it. The value of stock on a tenement is not material. (2)

A post windmill.

The pauper took a tenement at 6l. a-year, and the greater part of the time rented a piece of waste ground, of the lord of the manor, at the yearly value of ten shillings and sixpence, upon which he had the privilege of building a post windmill, and which he was to be at liberty to remove at pleasure. He accordingly built a post windmill upon that ground, at the expence of 120l. and worked it for about three quarters of a year, but rented the ground for two years and a half, the greatest part of which time the mill was standing thereon. The mill was constructed upon cross traces, laid upon brick pillars, but not attached or fixed thereto, which is the usual mode of building mills of that nature. And the mill was considered as the property of the tenant. He let it for a quarter of a year, and afterwards sold it as a chattel interest, and it was taken away by the purchaser, without any interruption of the landlord: and no rates were ever paid or demanded for it. Lord Kenyon, C. J. —"There is no doubt that the taking of a windmill attached to the ground, of the value of 10l. a-year, will confer a settlement; a præcipe will lie for such a windmill." The taking of a rabbit warren was also held to give a settlement, because it was a tenement; and so in the case of a land-sale colliery. But this windmill, as described in this case, is nothing but a chattel. And if,

(1) Southwold *v.* Yoxford, Burr. S. C. 140. 2 Str. 1127.

(2) Per Lee C. J. Weston *v.* Kirton, post. 42.

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in questions of this kind, we were merely to consider the ability of the pauper, without at the same time considering whether he rented a tenement, we should abandon the statute altogether, and the decisions upon it. It might as well be said, that an iron malt mill would give a settlement. (1)

The pauper rented under a verbal agreement, from Lady-day till six weeks after Michaelmas, two cows, at the rate of five shillings a cow per week, of J. G. who was tenant and occupier of lands in M. It was agreed, that J. G. should feed and support them, and depasture them, and no other cattle, upon certain lands therein specified. "But the said lands, on which the cows were so depastured, were not of the annual value of 10l. He gained no settlement, not having rented a tenement of 10l. a-year value. For the principle upon which the renting dairies has been held to confer a settlement is, that it is a contract for a certain interest in the land, to be enjoyed in a particular manner: and that alone constitutes it the taking of a tenement. But the value of the cows were never taken into consideration, as forming part of the value of the tenement. (2)

A dairy, where value of land less than 10l. but that of the taking which included cows, more.

But it is otherwise where the value of the land is raised by the amount of things erected thereon (3), or which are so connected with the land, as to fall (in legal contemplation) within the description of a tenement. (4)

But things connected with land, form part of the tenement's value.

Thus, in the case of the land-sale colliery (5), such erections as were attached to the mine, might be consi-

Land-sale colliery, &c.

(1) Rex v. Londonthorpe, 6 Term Rep. 377.
(2) Rex v. Minworth, 2 East, 198.
(3) Per Le Blanc, J. ib. 201.
(4) Per Lord Kenyon, C. J. ib.
(5) Rex v. North Bedburn, post. 32. (9). But it appears from Mr. Caldecott's report, that the annual value of the mine, distinct from the extra value of the moveables, as estimated in a schedule, exceeded 10l.

dered

dered as constituting part of the value of the tenement (1), but personal chattels merely leased with the land would not. (2)

Rabbits in a warren.

Likewise a thing, moveable in its nature, may be attached to a tenement as an accessary (3), so as to constitute a part thereof, and go to the heir as a member of the inheritance; in which case, the annual value of such things are part of the yearly worth of the tenement, and to be estimated as such in questions of settlement. Thus, although cows fed on particular lands are not considered as increasing the value of the tenement, *i. e.* the produce of the land, yet rabbits in a warren (4), the fish of a fishery (5), and, upon the same principle, doves in a dove-cot (6), which are attached to the tenement, and would go to the heir as part of it, are to be considered as augmenting its value.

When sessions don't find the value of the demised moveables.

Where the sessions find, that the amount of the rent paid is more than 10l. *per annum*, the court will conclude, that the tenement is of that value, although it is stated, that some personal chattels are likewise demised, unless the value at which they are rented is expressly stated (7). As where furniture and firing were found for a room let by the week (8), where a stock of horses, gins, ropes, and other things necessary for working a land-sale colliery, were let with it (9); the benefit derived from occupying

(1) Ut videtur per Le Blanc, J. Rex *v.* Minworth, 2 East, 201.

(2) Ut videtur per Lawrence, J. ib.

(3) Hargr. Co. Lit. 8. a. n. 10. Wentworth, Off. Ex. Ed, 1676, c. 5. p. 75.

(4) Rex *v.* Piddletrentithe, ante, Per Lawrence, J. Rex *v.* Minworth, 2 East, 201. Co. Lit.

(5) Per Lawrence, J. Rex *v.* Minworth, ante, (1).

(6) Co. Lit. 8. b.; and possibly also deer in a park.

(7) Per Buller, J. Rex *v.* Whitechapel, 2 Bott, 102. Pl. 146.

(8) Rex *v.* Whitechapel, ante, (7).

(9) Rex *v.* North Bedburn, Cald. 452.

these

these moveables was not considered as reducing the worth of the tenement below 10l. nothing being found as to their value.

Where a tenement is taken, or occupied jointly by two, and is of the value of 20l. a-year, both may gain a settlement, for the moiety occupied by each is of the value of 10l. *per annum.* (1) Value where a joint occupation.

But where a tenement is occupied by two jointly, and is under 20l. a year in value, neither can acquire one; and this not only where the tenants, after taking the farm jointly, pay their rents severally, divide the produce of the land between them, and stint their pastures equally, by the several flocks (2); but also, where they jointly hire and occupy the house and land, and jointly till and sow it, and jointly pay their rent (3). "If the law should be otherwise, the inconveniences arising from it would be intolerable; for, if forty persons, for the same purpose, were to rent a tenement of this value, each of them would be entitled to a settlement; the manifest de-

(1) Little Tew v. Duns Tew, post.

(2) Croft v. Gainsford, 2 Bott, 129. Pl. 172.

(3) Marden v. Barham, Burr. S. C. 311. The principle is the same if there is a joint occupation by three or more, and the tenement does not yield a rateable proportion of 10l. annual value for each, none acquire settlements. For, as the shares are equal, none occupy to the yearly worth of 10l. The words of the act are: "If any person or persons do come to settle in any tenement," &c. So that this is perhaps the only case in which the court has not gone beyond the literal interpretation of the statute in favour of settlements As the law now stands, if two take and occupy a tenement jointly, of the annual value of 16l neither gains a settlement. But if one take it, and underlet to the other, part of the premises to the value of 10l a year, even as tenant at will, both may acquire settlements. See the opinion of Aston, J. Rex v Newnham, post. Llandverras v. Northop, ante, 28. (1) See also Rex v. South Bamfleet, ante, 27.

sign of the statute would be thereby eluded, and the parishes would be loaded with poor." (1)

Of the Occupation, or coming to settle upon a Tenement.

Of the value paying rent immaterial.

Where a settlement is claimed by a tenement of 10l. *per annum* value, nothing further is required as to the occupation, than that the party hold possession as tenant by lawful means. "The sessions have no occasion to go into the title of the lessor at all (2)," nor into the conditions upon which the person occupies.

This constitutes the chief distinction between settlements which may be gained by occupying a tenement of 10l. a-year, and those to be acquired by estate. The value of the tenement is alone material where the annual value is 10l., nothing else being necessary except that the occupier holds by a lawful title to the possession. But where a settlement is claimed by estate, the interest or title of the party is every thing, and the value of the tenement of no importance to the question of settlement, except in cases pointed out by 9 Geo. II. c. 7.

The ability to pay 10l. a-year, and the credit obtained, are stated in some cases as the reasons why persons occupying a tenement worth 10l. annually were excepted from the statute. But these considerations have been determined not to be essential to this kind of settlement. "If a man should, out of kindness, settle another in a

(1) Per Eyre, C. J. and Reeve, J. Croft v. Gaunsford, ante, 33 (2).

(2) Per Buller, J. Rex v. Old Alresford, ante, 9. (7).

tene-

tenement of 10l. *per annum* value, receiving no rent, yet that will not alter the case." (1).

The pauper's brother commiserating the pauper's fa- family, gave him a close "to enjoy as long as I please, and to be taken when I please, and you shall pay nothing for it." The pauper enjoyed the close three years, the brother paying the taxes, the tillage was done by his horses and servants, the crops usually sown with his corn, and the harvest got in by his servants, and delivered by them to the pauper. The pauper's cattle continued exclusively on the land, except when the brother's cattle were put there, for the pupose of ploughing and sowing it. This occupation conferred a settlement under the statute. (2) Premises given without rent.

So did the occupation of part of a house belonging to a near relation, who permitted the pauper to live in it rent free. The house consisted of two separate tenements, one of which the pauper occupied with his family, together with a barn, stable, and yard appurtenant. He never paid any rent to his relation in respect of them, but the relation had all the dung and manure made by the pauper's cattle, and spread it upon his own lands, in an adjoining parish. This person occupied a tenement within the statute. *Per* Lord Kenyon, C. J.—"I am not prepared to say, that his relation could have turned him out of possession upon a day's notice. And though it is stated in the case, that the pauper paid no rent in money, it appears that there was an equivalent. The pauper brought all the dung and manure from his other tenements, and this relation had the benefit of it. *Per* Lawrence J.—"I should have no doubt that a landlord Occupation of premises giving landlord the dung.

(1) Per Parker, C. J. South Sydenham v. Lamerton, 1 Str. 57. Per Lawrence, J. post. 36.

(2) Rex v. Fillongley, ante, 5. (1).

might

might recover on a *quantum meruit*, on such an occupation as the present." (1)

Residence under implied agreement.

The pauper resided on a tenement with his father-in-law, of the yearly value of 11l. The father-in-law having received six months notice to quit, died three months afterwards, leaving five shillings to each of his other children, and giving the rest of his property, and stock upon his tenement, of the value of upwards of 40l. to the pauper's wife, and appointing her executrix. The pauper paid his brother and sister-in-law their legacies. He never proved the will, but continued to occupy the tenement with his wife for three months, until the expiration of the notice and paid the rent. His children got the will, and tore it to pieces. Lord Kenyon, C.J.—"If the question depended on the title which the pauper claimed under the will, in right of his wife, the facts stated would not warrant us in deciding that they could enforce any right under the supposed will, because the fact of there being a will should have been proved in a different manner. We cannot receive any other evidence of there being a will in this case, than such as would be sufficient in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration, with the will annexed, are legal evidence of the will in all questions respecting personalty. But on the other point, I cannot bring my mind to doubt. It is stated that the pauper resided for more than forty days on a tenement of more than the yearly value of 10l. for which he paid rent. Then it was said that he might have been turned out by some other person having a superior right, but it was not suggested who had any better title; and the landlord who received the rent could not turn him out." *Ashhurst* J. "In order to

(1) Rex *v.* Eritwell, 7 term Rep. 197. See Rex *v.* South Bemfleet, 1 Maule and Selw. 154. ante, 27.

acquire

acquire a settlement by taking a tenement of 10l. a-year, it is not absolutely necessary that there should be an express contract for the tenement; it is sufficient if the tenant reside forty days on a tenement of such a value, with the permission and consent of his landlord; for in such case the law implies a contract." *Buller* J.—"Supposing there was no will, and it were necessary to go beyond the implied contract between the landlord and pauper; here is sufficient evidence to shew, that all the parties interested consented to the pauper's continuing in the possession of the premises; for the other son and daughter received five shillings each, in lieu of all their right and claim to their father's property." (1)

The pauper, an elder brother, at his father's death, entered upon certain closes possessed by his father, but whose interest therein did not appear; and having possessed them some time, sold them, but it did not appear what interest he had therein. The Court thought the case imperfectly stated, as it did not appear that the pauper's occupation of the closes was a lawful one. But they were of opinion, that upon the facts stated, the court below would have been warranted in finding the pauper's occupation lawful; it being acquiesced in by all who were interested in disputing the possession with him, and if he was lawfully possessed of the premises, he gained a settlement. (2)

Residence by acquiescence of all interested.

So where the pauper married the widow of the owner of a cottage, value thirty shillings a year, and went to reside with his wife there; the widow never having administered to her husband, nor having any right to the premises; not having been admitted tenant, nor paid any rent for the same. He also occupied, in another parish,

Residence on a tenement, in consequence of marriage, the wife not having any right.

(1) Rex *v.* Netherseal, 4 Term Rep. 258.

(2) Rex *v.* Culmstock, 6 Term Rep. 730.

a house

a house and land of the yearly value of 9l. He gained a settlement, and the order of sessions finding the contrary was quashed without defence. (1)

Residence under a promise to purchase.

The pauper, in consequence of a parol agreement with the owners for the purchase of a cottage and garden, took possession thereof, and continued to reside near twelve months, but never paid the purchase-money, nor had any conveyance of the same made to him, the sellers appearing to have no title thereto, and the pauper paying no rent nor taxes until he relinquished the possession, and let in another person to occupy in the same manner. This was held a coming to settle upon a tenement within 13 and 14 Car. II. (2)

Residence by permission from former tenant.

The pauper, on 10th October 1800, by virtue of an agreement with S. who was tenant of a cottage to Mr. B. entered and occupied it, agreeing to pay the same rent of 2l. 12s. 6d. S. had no authority from B. to let his cottage, nor did he know any thing of the agreement. One month after the pauper entered, he applied to B, who agreed that he should have the cottage, provided one *Money*, to whom he had previously agreed to let it, did not take it. M. declining it, the pauper continued in the cottage as tenant to B. The pauper occupied at the same time, from 10th October to 12th December 1800, a public house at the yearly rent of 9l. The court thought the case too clear for argument, and that he gained a settlement by occupation of more than 10l. a-year, forty days. And Lord Kenyon said, nothing appeared of the former tenant's term having expired, and the law gave him an authority to assign his interest. (3)

Payment of rent by service,

And as it is immaterial whether the occupier pay rent, it must of course be so, where he agrees to pay for his occupa-

(1) Rex *v.* Donington, Burr. S. C. 744.

(2) Rex *v.* Culmstock, 37. (2).

(3) Rex *v.* Aldborough, 1 East, 597.

occupation in kind; as by the dung of his cattle (1); or by service instead of rent; as by keeping three highway gates in repair (2): by holding a house and ground from being appointed, and serving as herd to several persons having a right of common on a large extensive common or waste. (3)

Guarrantee or credit given to another, &c. immaterial where there is a taking, &c.

It is also immaterial whether the payment of the rent is guaranteed to the landlord by some other person (4), or whether credit is only given to the tenant for part of the rent (5), or whether he is rated for the premises (6), or whether at the time he commences the occupation, he is receiving parish relief from some other parish, if done without fraud. For per Lawrence, J. "It is argued, that unless credit were given to the pauper for 10l. a year in value of the rent, no settlement can be gained by him. But I don't know that that is a necessary conclusion. The statute 13 & 14 Car. II. c. 12. gives power to the justices to remove on complaint, within forty days, any person 'who shall come to settle in any tenement under the value of ten pounds,' and unless certain things are done, which are required by that statute. But they have no power given them to remove any person coming to settle in a tenement of that value, or upwards. Such a person is not submitted to their jurisdiction at all. The question, therefore, is not a question concerning the credit of the party, but whether in point of fact he came to settle, *i. e.* acquired the interest of a tenant in a tenement of that value; for if he did, the parties had no power to remove him. (7)

(1) Rex *v.* Fritwell, 7 Term Rep. 197. ante, 36. (1).

(2) Rex *v.* Whixley, ante 9. (8).

(3) Rex *v.* Melkridge, 1 Term Rep. 598.

(4) Rex *v.* Hope, 4 East, 362.; and see Rex *v.* Butley, Burr. S. C. 107.

(5) Ib.

(6) Rex *v.* St. Margaret's, Fish-street-hill, ante, 10. (1).

(7) Ib. 4 East, 369.

Inability to to pay immaterial.

So likewise it is immaterial, that having contracted to pay rent, he is unable to pay it. (1.)

But to acquire a settlement, the person must occupy the premises in respect of which he claims it by at least some right or interest in the possession. If a mere residence on a tenement for 40 days irremoveable, were sufficient to give a settlement, every lodger and every servant residing for that length of time would then acquire one. (2)

Thus where the pauper on 8th April 1811, agreed with B. for a house and shop in St. Margaret's parish, then in the tenure of G. at the annual rent of 13l. 13s. and G. was to be tenant to B. until 5th July following, from which time the pauper was to continue tenant, and pay rent. But on 15th June by G's. permission he put part of a stocking frame into the shop, and received the key thereof for the purpose from G. On 17th June he put in the remainder of the frame, and other frames before the 25th, when his daughter went to the shop to work, and the pauper found the key of the house in the outward door, and took it and put some goods therein by permission of G. the tenant and B. the landlord, and took articles of furniture therein as he went backwards and forwards to work at the shop, until 3d of July, when he and his family slept there. G. paid the rent up to 5th July, but left the house on 25th June. The pauper received relief from St. Margaret's from 28th June until his removal, and he "was neither

(1) Rex *v.* Denbigh, Trin. 44 G.III. 5 East, and Rex *v.* Hooe, ante, 39. (4). See also St. George's *v.* St. Catherine's, 2 Ld. Raym. 1474. 2 Bott, 39. Pl. 52. Rex *v.* Culmstock, ante, 37.

(2) Per Lord Kenyon, C. J. His Lordship goes on to say, "but in order to gain a settlement by residing on a tenement of the yearly value of 10l. the party must stand in the relation of tenant to the property for 40 days. Rex *v.* South Lynn. 5 Term Rep. 667. See vol. i. 242.

tenant

tenant of nor occupied B.'s house for 40 days, nor did he ever pay any rent for the same."

Lord Ellenborough, C. J. It is assuming more than the facts of the case warrant to say that the landlord consented to the pauper's occupation as tenant on the 25th June. The landlord could neither put him in nor turn him out; for another person was then the occupier and tenant of the premises. Then the tenant's leaving the key in the door only shewed his consent to the pauper's putting his goods into the house; and the question is whether a mere liberty of that sort is an occupation. In the King v. Aldborough (1), there was a tenancy created in express terms; but here the pauper stood in no relation of tenant to the premises at the time. He never got into the period of his tenancy, but when he was in the house upon an expectation only of becoming tenant he was removed. (2)

The use and time for which the tenement is taken are unimportant, provided there is an occupation of forty days. Taking land from Candlemas to Michaelmas, for growing potatoes (3), or from June till Lady-day following (4), or a room by the week (5), is sufficient. So if no time is expressed in the agreement, for the law affixes a limit in such case. As where one takes the after-grass of a meadow; the time of holding is limited by the duration of the thing demised (6), so a tenancy Also time for which tenement taken.

(1) 1 East, 59.

(2) Rex v. St. Michael's in Coventry, 15 East, 567.

(3) Rex v. Shenstone, Burr. S. C. 474.

(4) Staunton under Barndon v. Ulescroft, Burr. S. C. 558. So a house taken for five months, St. Matthew's Bethnal Green v. St. Botolph's, Aldgate, Burr. S. C. 574.

(5) Rex v. Whitechapel, post. 42.

(6) Rex v. Brampton, ante, 9. (6), where the taking was of the fogs and after-grass of the two fields; the one at 30s., and the other a guinea a year, were held sufficient, together with renting a tenement of the yearly value of 9l.

Taking for the purpose of gaining a settlement.

at will is sufficient (1). And it seems to make no difference, that the party takes it for the puspose of gaining a settlement, if done without fraud. The pauper, having taken a tenement at 10l. a-year, was told by the former tenant before entry, that the tack was too dear. To which he answered, that he did not regard the dearness, for as it was 10l. a-year, it would gain him a settlement, and put an end to a dispute there was between two towns, about his settlement. But he desired such former tenant to take no notice thereof to any body. He gained a settlement, the sessions not having found that there was any fraud in the taking (2). So although he be not of ability to stock the farm, it will do, if taken without fraud (3). Neither does it make any distinction, that the tenement is what is called half-year land, *i. e.* where others have a right of inter-commoning for six months in the year (4), or that it is jointly occupied by more tenants than one, provided it be sufficient in value (5), or, that the landlord is to have a partial use of it. As where a room was hired at four shillings *per* week by A. being a justice's clerk, for the magistrates to transact the public business in; the room was furnished, and the landlord to find firing, and have the use of the room on assembly nights, being once a fortnight, and at other times, when A. did not want it (6). Or that the tenant under-lets part (7), and such under-tenant, if he occupies a sufficiency in value, gains a settlement. (8)

Tenement occupied by more than one gives a settlement.

(1) Cranley *v*, St. Mary, Guildford, 1 Str. 502. Rex *v*. Duns Tew, Burr. S. C. 398.

(2) Rex *v*. Kirton, Burr. S. C. 166.

(3) Ib.

(4) Rex *v*. Donnington, ante, 38. (1). Rex *v*. Dersingham, ante, 9. (9). Rex *v*. Hollington, ante, 15. (1). So also different tenants may occupy different tenements in the same soil; as one the grass, another a rabbit-warren. See Rex *v*. Piddletrenthide, vol. i. 512. (1).

(5) Rex *v*. Seamer, 6 Term Rep. 554.

(6) Rex *v*. Whitechapel, 2 Bott, 100. Pl. 146.

(7) Rex *v*. Duns Tew, ante, (1). Rex *v*. Newnham, Burr. S. C. 756.

(8) Rex *v*. Seamer, ante, (5). Rex *v*. Duns Tew, Rex *v*. Newnham, ante, (7). ante, p. 33.

Guff-

Guffkyns, the pauper, and his father-in-law Goodwin, rented a farm as partners. Afterwards Goodwin alone took a farm of 52l. a year, in Little Tew, for four years. After the taking, and before entry, Guffkyns inquired of Goodwin, whether he depended upon his going with him to Little Tew? Goodwin replied, he did, for he could not go without him. They removed to the farm together, with their joint stock, and managed it for seven years, both residing thereon. The receipt for rent was given to Goodwin only. A distress for rent was made, of such goods as the landlord supposed to be his, and Goodwin gave a bill of sale of the stock, Guffkyns standing by without interposing. The court were of opinion, that Guffkyns gained a settlement by his occupation; for being taken in partner by Goodwin, he had at least an interest as tenant at will to Goodwin, of the moiety of a farm, worth 52l. *per annum* for the whole of it, and consequently, his moiety above 10l. *per annum.* (1)

Joint occupation of farm.

But he must be lawfully intitled to the possession without fraud.

Must be in lawful possession.

The pauper lived and rented a house at C. at 8l. 10s. *per annum.* The corporation of C. is possessed of the fairs and markets within the borough, and of the toll for *all cattle actually sold at the same.* The pauper at a court-leet *took the toll by a verbal agreement,* of the corporation, at 12l. a year, and continued to collect it under that agreement for two years. The sessions were of opinion, that he gained a settlement by taking a tenement within the statute. But Lord Ellenborough, C. J. said, that as no interest passed to the pauper by such parol demise, the question could not be raised. It was a mere licence to him to collect the tolls, the right to which

Holder of tolls under corporation without deed.

(1) Rex *v.* Duns Tew, ante, 42. (7).

still

still remained in the corporation, though it might be a ground on which to apply to a court of equity. The court, he added, had gone far enough from the words of the statute in noticing an incorporeal tenement as one, the taking of which could confer a settlement; but if beyond that, they were to hold, that an equitable interest in an incorporeal tenement, under a parol demise, from a corporation which could only demise by deed, could confer a settlement, there would be no saying where to stop. (1)

Fraudulent possession insufficient.

The pauper being entitled to two freehold houses, one of the value of 28l. and the other 26l. a-year, conveyed them by lease and release, to trustees, in trust to be sold, and the money arising from the sale to be paid first, in discharge of the mortgages due thereon, amounting to 500l. afterwards to his other creditors, rateably; and the surplus, if any, to him, his executors and assigns. The houses were let to other persons at the time of the conveyance, and the pauper resided in a public house, in another parish, until he failed. Afterwards, one of his houses becoming void, the trustees being in possession, and having the key thereof, employed a lodger in the pauper's house to clean it, and gave her the key for the purpose, which having done, she placed the key in the bar of the public house among some things of her own, which she kept there, intending afterwards to re-deliver it to the trustees; but the pauper's wife took it from thence, and took possession of the vacant house, and with her husband

(1) Rex v. Chipping Norton, 5 East, 239. The court directed an inquiry to be made, whether any interest in the tolls had passed from the corporation under their seal; and it being afterwards reported, that no other instrument had been executed, except a bond, given by the pauper to the corporation, with sureties for the rent; the court said, that could convey nothing from the corporation; and the rule stood for quashing the order of sessions. See also Rex v. Denbigh, 5 East, 133.

con-

continued there until the time of the removal, being one year and three quarters. One of the trustees seeing her convey her goods thither, gave her notice that she was doing wrong, not having the consent of either the trustees or creditors; to which she replied, "I am going to my own estate, for I and the children can't lie in the street." The premises had not yet been sold, and the value was about 650l. The debts owing by the pauper, for which such trust deed was executed, including the two mortgages, were 881l. and upwards. It did not appear on that deed how the annual rents were to be disposed of till the sale should be made. Lord Mansfield, C. J. "If the estate on which a pauper resides is substantially his property, that is sufficient, whatever terms of conveyance there may be: and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense, to say the mortgagor is not the real owner. But here, what interest had the pauper in this estate? He made an immediate conveyance to trustees (not a mortgage), to sell and pay off two mortgages and other debts; and when this conveyance was made, it was so doubtful whether there would be any surplus, that the deed says, that he shall have the surplus, *if any*. He had only a chance of the residue, and had not a right to continue a moment in possession. A mortgagor has a right to the possession, till the mortgagee brings an ejectment; and after the mortgagee has got into possession, he might gain a settlement. *There is still another and a stronger ground in this case; for the possession was gained by fraud.* (1)

(1). Rex v. St. Michael's, Bath, Doug. 630. And see the opinion of the judges upon this case, Rex v. Edington, 1 East, 288. Rex v. Tarrant Launceston, 3 East, 226.

The

Fraudulent taking.

The pauper was a day-labourer, and rented a cottage at 1l. 12s. *per annum*, in parish A. in which he resided. While he so rented it, he took a meadow for one year, in parish W. at the rent of ten guineas, of one N. who resided in the said parish, and rented this, together with other ground, of Mrs. T. and paid the poor rate thereof, being by covenant to be reimbursed by Mrs. T. The pauper did not stock it at all, but at Christmas let the grass for three guineas to E. P. without N.'s privity. B. stocked it, and paid the rent to the pauper, who afterwards, but not on the same day, paid N. his landlord half a year's rent. Several persons had offered to take the grass of the pauper before he let it to B. The pauper laid up the ground for mowing, and then let the shred or mow to N. for five guineas, and the after-grass for two. At the end of the year, when he came to settle accounts with N. the pauper received two guineas on balance of accounts, after allowing five guineas to N. for the half year's rent then due. N. did not apply to the pauper to take this ground, but the pauper applied to him, and he readily trusted him; N. assigning as a reason, that he believed him to be an honest man, though a day-labourer, having known him upwards of twenty years, and that he had heard just before he let him the estate, that the pauper had received a legacy from a brother-in-law, equal to a year's rent. N. had frequently made a practice to take ground and let it out again in parts and parcels. Three years previous to the taking of the above meadow, the pauper applied to the parish officers of W. for relief, on account of sickness, and was relieved by them. About half a year after he took this meadow, his wife applied and received pay of parish W., he then being sick in Exeter hospital. He made a fresh agreement for taking another field of N. at 13l. *per annum*, on the morning he was examined before the justices touching his settlement. The sessions were unanimous that the taking of the field

 was

was fraudulent, and that he gained no settlement in parish A. And the court were of opinion, that the conclusion of the justices, upon the facts stated, was right. (1)

But it is sufficient if he continue tenant. It is immaterial whether he have stock sufficient for the premises when he enters thereon, if there is no fraud (2); and it is equally so, although he keeps neither stock nor effects upon them. (3)

Unnecessary to have stock on the premises.

He need not occupy the entire tenement himself, and if he let the possession of part to another, it will not prevent his settlement. The pauper rented a tenement of 10l. *per annum* value, and paid the rent to the landlord. He lived in a part of it worth forty shillings a year only; and let the rest to under-tenants. The court were unanimously of opinion, that he had taken a tenement of the value of 10l. a year, and was the tenant all the time. It is not necessary to occupy it himself; for when 13 & 14 C. II. speaks of persons coming to settle in a tenement under the value of 10l. a-year, and does not require a person renting a tenement above that value to occupy it, it is enough if he rent it and reside forty days in the parish; and if it be a *bonâ fide* taking, he may underlet it as he pleases. (4)

He may underlet.

(1) Rex *v.* Woodland, 1 Term Rep. 261. Absent, C. J.

(2) Rex *v.* Kirton, ante, 42. (2).

(3) Rex *v.* Donnington, ante, 38. (1). Rex *v.* Hooe, ante, 39. (4).

(4) Rex *v.* Northop, Burr. S. C. 571. 1 Black. Rep. 603. Per Aston, J. Rex *v.* Newnham, post. 49. (2). Per Grose, J. Rex *v.* Hooe, post. 50. (1). But Lord Ellenborough, C. J. seemed of opinion that it might form a distinction that the whole tenement was in the same parish. Rex *v.* South Bamfleet, 1 Maule and Selw. 154. ante, 27., and Le Blanc, J. declared that the words of the statute had been sufficiently departed from already, and the court held that an occupation as tenant in A. could not be coupled with an interest in a freehold as lessee of premises in B. so as to complete a settlement. Ibid.

As

Distinction between joint tenancy and joint occupation.

As a tenement may be of greater annual value than 10l., so as to give a settlement when rented by one, and yet not of sufficient value to confer it, if jointly taken by two or more, it may be necessary to distinguish in the case of joint occupants, between a joint taking and a joint occupation. (1)

Case of joint occupation.

H. D. and his father-in-law R. M. jointly rented, stocked, and occupied, for three years, an estate at parish N. of 80l. a-year. R. M. dying, H. D. soon afterwards took a house alone of R. W. at the yearly rent of 3l., and lands of I. S. at the yearly rent of 8l., both in parish A. R. M.'s widow, together with H. D., being upon the death of R. M. jointly possessed of the remainder of the stock which had been on the estate at N., they went and lived at the house in parish A., and jointly occupied it with the estate; the stock thereon being partly the property of H. D., and partly the property of the widow; and sometimes one of them sold one part of the stock, and received the money for the same, and at other times the other. At the time of taking the said tenements by D., neither of the landlords knew of the connection subsisting between him and the widow. D. only was personally responsible for the rent, and a moiety of the stock was more than sufficient to stock the said house and farm. Aston, J. "If two persons jointly take a tenement of less value than 20l., it is clear that this will not gain a settlement to either of them. But a man who takes more than ten pounds in yearly value, may let part of it to under-tenants, and this will not destroy his settlement, though it will not gain one to such under-tenants who pay him less than ten pounds a year." This was determined, in the case of Llandverras (2). This woman, the widow, was in the nature of an under-tenant to the pauper. He

(1) See ante, sect. iii. 33. (2) Ante, 47. (4).

had

had the credit of taking the tenement: he alone took the house, and likewise the lands. Neither of the landlords knew of any connection between the widow and him, and he only was personally responsible for the rent. They were not partners in taking the tenement, though they were joint occupiers of it. She would gain no settlement by merely being a joint occupier, without having been concerned in taking (1), nor shall the person who alone took it, lose his settlement by letting in a joint occupier. (2)

A taking by one, on joint credit given to him with anoth for the ren.

The pauper A. took a house with certain rights of common annexed, from Pococke, at 11l. a-year. Previous to his contracting for it, one Porter, with whom he was engaged in a contract for carrying chalk coastwise (which was the reason of his taking the house), had agreed with the pauper to take part of the premises under him, and to pay him for it 5l. *per annum*. Porter was desirous of having the pauper in his employ, and was the first person who made application to Pococke for his house. Previous to its being let, Pococke said he would not let the house, except Porter would guarantee the rent. Porter consented, but was not present when the pauper made his contract with Pococke, who then said expressly, that he made his agreement with the pauper only, and considered none but him as his tenant. The pauper paid the whole rent for the first year by instalments, and part for the year following, the rest remained unpaid. A. would not have hired the premises, unless Porter had agreed to take part of them with him; and Pococke did not consider him of sufficient credit and ability to hire them, if Porter had not guaranteed the payment of the rent. The Sessions was distinctly of opinion, that none of the parties acted with a fraudulent intention, but that upon the

(1) See ante, 39 contra. (2) Rex v. Newnham, Burr. S. C. 756.

facts, credit was given to the pauper for only 6l. of the rent, and for the residue it was given solely to Porter. But the Court of K. B. were of opinion, that although the case was imperfectly stated, yet sufficient is found to shew that the pauper took the whole tenement, and that the guarantee of Porter, to relieve the pauper from the responsibility of so much of the rent, made no difference. For it is immaterial whether credit was given to the pauper for the rent, if he was tenant of the whole premises. (1)

What possession in law.

It is also necessary, but sometimes difficult to determine, what amounts to a continuance, in the possession of a tenement; for a person may be in possession, in point of law, notwithstanding he has done all in his power to part with it.

Tenant giving up, but landlord not accepting possession before expiration of the term.

G. rented a tenement in Hursley of W. at 10l. a-year, for a year, from Lady-day. G. resided therein five or six weeks, and then quitted it, tendering the key to W. who refused to accept it. G. thereupon left it with a neighbour, before Midsummer-day then next, for W. to take it when he thought proper. On Midsummer-day, G. took a tenement in St. Maurice, and entered into possession, at the rent of 9l. a-year, and resided thereon above forty days, before the key of the tenement in Hursley was received by W. A settlement was gained by G. in St. Maurice. For the contract for a year in Hursley was not dissolved, the landlord refusing to accept the key, until after G. had resided more than forty days in St. Maurice. He held both tenements together, during that time. The former contract was not at an end: the landlord might have brought his action for the rent. (2)

(1) Rex v. Hooe, 4 East, 362. (2) Rex v. St. Maurice, Burr. S. C. 588.

The

The pauper Henry Golbourne took a tenement in Maghull, of the yearly value of 7l. for the term of eleven years, consisting of a cottage, and about an acre of land, by a verbal agreement from the Earl of Sefton, for which the pauper was to pay the taxes, and which tenement the pauper let by a like agreement, for his whole term therein, to John Wignall, at the same rent and terms; and it was part of the said agreement between the pauper and Wignall only, that Wignall should pay his rent to Lord Sefton: that the cottage was, at the time of the letting, in the occupation of Elizabeth Linford, who had before taken the same from the pauper, at the yearly rent of 3l. Wignall entered into immediate possession of the land, being of the yearly value of 4l. and let the cottage to Linford, at the rent of 3l. The pauper afterwards rented a tenement of the yearly value of 75l. in Melling, and resided thereon three years. Being sold up by his landlord, and distressed in his circumstances he, in or about the year 1780, gave up that tenement, and came back to Maghull, having nothing but a few household goods to bring with him, where he took a cottage from one William Wood, of the value of 3l. a-year, on which he re-resided a year, or more. Wignall was taken for tenant to Lord Sefton of the whole premises in Maghull, and secured to His Lordship the rent thereof for the year 1778, by the joint bond of the pauper and the said Wignall. Wignall also received from Linford one year's rent for the cottage, distrained upon her for another, and the third year she had no goods to distrain on. The pauper, after he had by an artifice got Wignall from home, without his consent, entered upon the said land, which was then in Wignall's occupation; and was by Wignall, after his return home, found mowing the same. But Wignall's wife being the pauper's sister, she begged of her husband not to stop the pauper from mowing out the same; wherefore he let the pauper reap the hay; and the Case of occupation.

 pauper

pauper held the land much more than forty days, whilst he resided on the cottage which he took from William Wood. But the pauper, after he returned to Maghull, never received any rent of the cottage occupied by Linford, she not considering the pauper to have any right to demand the rent from her. The pauper, in the year 1780, paid Lord Sefton's agent 3l. 3s. in part of the rent for 1780, which the agent demanded from him; being glad to receive the rent from whomsoever he could, though he considered Golbourne as getting fraudulent possession; and the pauper and Wignall entered into a joint security together to Lord Sefton for the residue of the rent for the year 1780, which was never paid.

Lord Mansfield, C. J.—"The circumstances of this case are very peculiar. They never did occur before, and probably never will again, and can never be an authority. It is put on this ground, that the original lease, which was no more than a lease at will, has, by assignment, been vacated; and that it must be shewn, that it has been renewed by a fresh demise, or a settlement was not gained at Maghull. It might be difficult to shew, that any new lease was granted: but was the old lease vacated? I am of opinion it was not. Throughout, Lord Sefton considers the pauper as his tenant, and he continued liable for the rent. In 1785, several years after the assignment, he is in possession; and His Lordship accepts rent from him, and takes security from him for the rent in a bond, in which he is joined by another person. This, with the other circumstances attending it, *i. e.* the pauper's being at that time in possession, and the acceptance of rent from him, shews that Lord Sefton retained him as tenant, and certainly does not afford, as was attempted, any ground of argument on the other side."

Buller, J.—"There is a seeming contradiction between Lord Sefton's conduct, as collected from all the

 other

other facts in the case, and the fact stated, that the assignee was taken as tenant by His Lordship; but there is one way of reconciling it. Lord Sefton agreed to the occupation by the assignee, and received rent from him, but did not mean to give up the pauper as tenant. His meaning was, to have them both liable. (1)

SECT. V.

Of the Residence.

In order to gain a settlement by occupying a tenement of 10l. *per annum*, there must be a residence of forty days, either on the premises, or at least in the parish where some part of them lie. (2) 40 days' residence.

The pauper rented a farm in K. at 30l. *per annum*, and resided from Lady-day 1779 to Christmas 1781, when he went with his wife publicly to reside with his son-in-law in T. taking with him all his furniture, and the stock remaining on his farm at K. He resided with his son-in-law in T. upwards of forty days, before he delivered up possession of the farm in K. but he did not hire or occupy any land whatever in T. He gained no settlement by the residence in T. Buller J.—"It is taken for granted in all the cases, that the pauper must reside in some part of the parish in which his property lies; and I think it is expressly laid down in the case of Ryslip and Harrow (3), that the residence must be connected with the occupation." (4) Must reside in the parish where his tenement is.

(1) Rex *v.* Maghull, Cald. 429.

(2) Per Ashhurst, J. Rex *v.* Knighton, 2 Term Rep. 48.

(3) 2 Salk. 524.

(4) Rex *v.* Topcroft, Cald. 478. See also Rex *v.* St. Giles in the Fields, Cald. 481. n. (c). Rex *v.* Butley, Burr. S. C. 109.; which was a question of residence, where the settlement was claimed by estate.

So where the pauper rented a windmill in one parish, and resided together with his wife and servant along with his father-in-law in another, but neither rented nor occupied a tenement there, he gained no settlement where he resided. (1)

Need not be on the premises.

But it is enough, if he dwell where part of the tenement lies (2); he need not reside upon any part of what he takes. (3)

Must reside 40 days. A previous removal by force, prevents a settlement.

It is absolutely necessary, however, that the party shoud reside forty days. A pauper got possession privately from the tenant, of a tenement of the yearly value of 10l. 10s. After residing in it twenty-nine days, he was forcibly removed, with his family, by the original landlord, aided by some of the parishioners and the overseers of the poor of the parish, and was thereby prevented from residing forty days: he gained no settlement, the residence being insufficient. (4)

Residence in prison in another parish, though tenant's family reside on premises, gains no settlement.

The pauper took a tenement at 15l. *per annum* in St. Martin's: five days after he took possession he was arrested, and carried to a prison in another parish, but his family continued to reside in the tenement for two months, the husband remaining in prison. Neither he nor his family were settled in St Martin's, for "no settlement is gained by a residence for a shorter period than forty days. (5)

(1) Rex *v.* Knighton, 2 Term Rep. 48.

(2) Rex *v.* Fritwell, ante, 33. (1).

(3) Per Aston, J. Rex *v.* Llandvertas, Burr. S. C. 572.

(4) Rex *v.* Llanbedergoch, 7 Term Rep. 105. No fraud being found, the court would not enter into that question, as it is a fact which must be expressly stated by the sessions, and cannot be inferred by the court.

(5) Rex *v.* St. George the Martyr, 7 Term Rep. 466. See also Rex *v.* Dilwyn, Burr. S. C. 54. But if a Fleet-prisoner rent a house of 25l. per ann. within the rules, and live in it, he gains a settlement. St. Margaret's Westminster *v.* St. Martin's Ludgate, 2 Str. 914. post. chap. xxvii.

The

The pauper must also stand in the relation of tenant to the property during the forty days' residence. A wife therefore cannot acquire a settlement by residence in her husband's life-time, on a tenement taken by him (1); neither can her residence, as such, be coupled with subsequent residence as a widow.

He must be tenant to the property 40 days. Residence by wife.

The pauper hired a house 23d October 1792, entered into possession with his wife and children on the following day, and resided till his death, 8th November 1792. The wife and children continued to reside until 11th December 1792, when she paid up half a quarter's rent, and quitted possession. She gained no settlement by the residence: for the residence of the husband cannot be coupled with that of the widow, because they were in distinct rights (2). And if it is considered as a new taking by the widow, there must be a residence of forty days after she has obtained credit for the tenement (3), whereas she resided only thirty-three days after her husband's death. (4)

Residence as a wife cannot connect with that as a widow to confer a settlement

We have seen, that residence must be in the parish in which the tenement lies. But if the party has a tenement, or tenements, of sufficient value, situated in different parishes, and has resided in both, he is settled where he slept the last night of his occupation, provided he has slept there forty nights in all. And it makes no difference that the tenement in that parish is of the lesser value (5), or only an occasional residence taken for a particular purpose, and that the party's regular

Residence when tenements in different parishes.

(1) Rex *v.* St. George the Martyr, 7 Term Rep. 466.

(2) Per Ashhurst, J.

(3) Per Lawrence, J. ib.

(4) Rex *v.* South Lynn, 5 Term Rep. 664.

(5) Gratwick *v.* Shenstone, Burr. S. C. 474. Rex *v.* St Mary Lambeth, 8 Term Rep. 240.

home, and the residence of his family, is in the other parish. (1)

The pauper took a farm in the parish of C. for nine years at 26l. 5s. payable on the 1st of July. It was agreed he should enter on the arable on the 14th of February, and on the dwelling-house and the rest of the premises on the 13th of May following. He accordingly entered into possession of the land, which was above the annual value of 10l., between the 14th Feb. and the 8th of May, repaired the fences, plowed, and did other acts of spring husbandry. Soon after he agreed with the tenant in possession of the dwelling-house, to take him to board at 1s. a day while he was husbanding the land, and he slept there, at intervals, 16 nights before the 6th of May, when he received possession of the dwelling-house and brought his wife, family, furniture and flock thither from another parish where they had previously been and he had mostly dwelt. He remained afterwards in the farm at C. 36 days, when, his goods being taken in execution, he applied for relief to the overseers of C., and agreed to quit the farm. Held too clear to admit of argument, that the pauper came to settle upon his tenement in C. from the beginning of his lodging with the outgoing tenant, which, being joined with his residence after the 6th of May, made above 40 days in the whole, and settled him there. (2)

(1) Rex v. St. Mary Lambeth, ante, 55. (5). As to the alternate residence of servants, ante, vol. 1. 421. and of apprentices, ante, vol. i.

(2) Rex v. Caton, 1 Const. Appen. 748. Pl. 1070.

SECT.

SECT. VI.

Of the Proofs necessary to establish a Settlement by occupying a Tenement of the annual Value of 10l. *a Year.*

It will be necessary to prove, 1st, The nature of the tenement; 2d, The lawful occupation (1); 3d, An annual value of 10l. during occupation; 4th, Forty days' residence in the parish while he occupies. Proofs.

This proof may depend partly upon written evidence (2), and partly upon parol testimony (3); the rules respecting which will be found in antecedent sections.

(1) See Rex *v.* Culmstock, ante, 37. (2) (3) Ib. p 433

(2) Ante, vol. 1. ch xxi. sect. 6.

CHAPTER XXIV.

Of Settlement by Estate.

SECT. I.

Of the Estate necessary to confer a Settlement.

Estate what.

AN estate is defined by Sir William Blackstone to signify such interest as the tenant has in lands, tenements, or hereditaments. (1)

In what things.

The nature of the thing, or property, out of which the interest which is to confer a settlement must arise, does not seem to have been expressly defined. The reported cases generally respect settlements by estate in land, and it is no where directly considered, whether a settlement can be acquired by an estate in a tenement, as that word has been explained under 13 and 14 Car. II. (2), or in the more extensive denomination of property, called an hereditament. (3)

Estates in incorporeal heredita-ments.

The principle upon which these settlements are founded, viz. that the party shall not be removed from his own (4), but is entitled to the care of his property, goes beyond estates in land, and seems to extend this right to all interest in things immoveable, situate within a town

(1) 2 Black. Com. 103.

(2) Ante, 7.

(3) 2 Black. Com. 20. 2 Wooddeson's Lect. 56.

(4) See Ryslip *v.* Harrow, Salk. 524. post. 62. (4). Rex *v.* Uttoxeter, Burr. S. C. 538. post 61. (3). Rex *v.* Aythorpe Rooding, ib. 412. Rex *v.* Hasfield, Burr. S. C. 147. 2 Str. 1132. Rex *v.* St. Nyott's, Burr. S. C. 132. Rex *v.* Houghton Le Spring, 1 East, 247.

or

or parish, which, as the party cannot take with him to the place of his settlement, he must be allowed to remain where they are, for the purpose of superintending them.

But the interest must issue out of the realty locally situated in the parish where the settlement is sought. Must issue from the realty.

The pauper's grandmother being possessed of an estate in Cheriton Fitzpayne, for a term of years determinable upon the death of his mother S. W., devised to the pauper J. W. the sum of ten pounds a-year, to be paid by her executors, in trust therein named, *out of her estate*, during the said J. W.'s mother's life, and if her grandson J. W. should happen to die before his mother S. W. she demised the annuity over to his brother and sister, and the survivor. The testatrix died soon after, leaving this leasehold estate, and effects to the amount of 32l. and no more. The pauper being settled in S. and in debt, in order to avoid his creditors, went to Cheriton Fitzpayne, and resided with his mother on the leasehold estate more than forty days, carrying on the business of a jobber in cattle. Lord Mansfield said, there was no colour for adjudging the pauper to have gained a settlement in Cheriton Fitzpayne. He did not go thither to reside upon *his own*. He absconded there to avoid his creditors. This was no specific legacy: it is payable out of her whole personal estate. But if it were a specific legacy, has a specific legatee any right to go and live upon the estate? If it had been a rent charge out of a freehold, it would not give a right to live upon such freehold; but this man has only a pecuniary demand. There was no colour for his going to live upon her leasehold estate as his own. (1) An annuity charged by will on personal estate, gives no settlement.

(1) Rex *v.* Stockley Pomroy, Burr. S. C. 762.

An annuity charged on real estates to a charity-school to be paid to the vicar, is not an interest to the person officiating as school-master, which gives a settlement.

T. M. officiated as schoolmaster (in the charity-school) at Melborne, in Derbyshire. During his continuance there, Lady B. Hastings, by deed inrolled, conveyed to trustees and their heirs, certain lands in trust, to receive and pay the rents and profits; among others, "the yearly sum of 10l. to the charity-school of Melborne, to be paid to the vicar there, for the time being." Which sum T. M. received from the vicar to the time of his death. The sessions apprehended, that T. M. "had gained a freehold estate, by receiving the said 10l. a-year under the said deed." But by the court, "This annuity of 10l. *per annum* does not appear to be appropriated to the school-master; nor does the man appear to have had any interest in it (though indeed he received it): he could have *no freehold* in it beyond doubt." (1)

Settlement by what estates gained.

An estate or interest in things real is affected by various qualities and circumstances, which are to be noticed on this subject. As 1st, the nature of the tenure. But this does not affect a settlement. It may be acquired by an estate in lands, held in frank-tenure (2), or by copyhold (3). 2d, The duration of the estate, which seems likewise immaterial, if it is sufficient to ensure a residence of forty days. It may be either a freehold estate in fee (4), or for life (5), or a copyhold in fee (6),

(1) Rex *v.* Melborne, Burr. S. C. 244. ante, vol. i. The pauper resided under a certificate. See 9 & 10 W. III. c 11. But if the schoolmaster is in effect the *cestuy que trust* residing upon what is substantially his own, he acquires a settlement. See Rex *v.* Owersby le Moor, 15 East, 356. and post. 78.

(2) Rex *v.* Charlton, 2 Bott, 493. Cald. 416. Pl. 511. Rex *v.* Great Farringdon, 6 Term Rep. 520.

(3) Harrow *v.* Edgeware, 2 Bott, 465. Pl. 485. Rex *v.* Burclear, 1 Str. 163.

(4) Rex *v.* Charlton, ante, (2). Rex *v.* Great Farringdon, ante, (2).

(5) Rex *v.* Shenston, Burr. S. C. 458. where the pauper was certificated.

(6) Rex *v.* Stone, 6 Term Rep. 295.

or for life (1), or a leasehold interest determinable on lives (2), or years (3). Even a tenancy from year to year (4), when acquired by proper means, as also the right which the widow has under magna charta, chap. 7. to continue forty days upon her husband's lands until she is assigned her dower, are interests sufficiently permanent to confer a settlement. (5)

But the interest must be of sufficient permanency to render the party irremoveable during his forty days of residence (6). A tenant at will cannot acquire a settlement as such (7), unless his tenement is of the annual value of 10l. when it ranks under a different species of settlement. (8) Must have a certain permanency.

The great principle upon which this species of settlement is founded is, that a person cannot be removed from *his own*. The chief question therefore in this part of the law of settlement, respects the means, by which property becomes a man's own, or, in other words, his his title to the estate. (9) Settlement rests on party's title.

The methods of acquiring property are usually divided into two kinds. Modes of acquiring property.

1. By descent, or hereditary succession, which is the title whereby a man on the death of his ancestor ac- 1. Descent

(1) Harrow *v.* Edgeware, 2 Bott, 465. Pl. 485. Rex *v.* Ingleton, Burr. S. C. 560 post, 64. (1).

(2) Rex *v.* Marwood, Burr. S. C. 386. post. 64. (1). Rex *v.* Cold Ashton, Burr. S. C. 444. pauper certificated.

(3) Murfley *v.* Grandborough, 1 Str. 97. Rex *v.* Uttoxeter, Burr. S C. 538.

(4) Rex *v.* Stone, ante, 54. (6).

(5) Rex *v.* Painfwick, Burr. S. C. 783. Rex *v.* Long Wittenham, Cald. 474. where the widow was certificated.

(6) Rex *v.* Stone, ante, 60. (2).

(7) See the opinion of the Judges, Rex *v* Widworthy, Burr. S. C. 109.

(8) Ante, 30. 40.

(9) Lord Coke's definition is *Titulus est justa causa possidendi id quod nostrum est.*

quires

quires his estate by right of representation as his heir at law.(1)

2. Purchase. 2. Purchase, when taken in its largest and most extensive sense, is thus defined by Littleton(2): the possession of lands and tenements which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contra-distinguished from acquisition by right of blood, and includes every other method of coming to an estate, except by inheritance.(3)

But this distinction is scarcely of further use in the law of settlement, than to distinguish between the legal import of the word *purchase*, and that more limited sense in which it is used in the 9 Geo. 1. c. 7. sect. 5.

Settlement on an estate by descent. An estate to which the party is entitled by descent, will always confer a settlement, without regard either to the annual or total value of the interest.(4)

By purchase. An estate acquired by purchase also confers a settlement, except in certain cases. Where the settlement is claimed by estate, the annual value of the property is immaterial, but the price given for the interest is rendered important by 9 Geo. I. c. 7. s. 5. which enacts "that after 25th March 1753, no person or persons shall be deemed or adjudged, or taken to acquire any settlement, in any parish or place for or by virtue of any purchase of any estate or interest in such parish or place whereof the consideration for such purchase doth not amount to the sum of thirty pounds, *bona fide* paid, for any longer or

Price of interest material under 9 Geo. I. c. 7.

(1) 2 Black. Com. 14. & 26.
(2) Litt. Sect. 12.
(3) 2 Black. Com. 15. [illegible] cites Co. Lit. 18.
(4) Rex v. Great Farringdon, 6 Term Rep. 679. Rex v. Hasfield, Burr. S. C. 147. 2 Str. 1132.; and see Ryslip v. Harrow, 5 Mod. 416. Ashbrittle v. Wiley, 1 Str. 608. Rex v. Garway, Burr S. C. 632.

 further

further time, than such person or persons shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person or persons were last legally settled, before the said purchase or inhabitancy therein."

It becomes necessary, therefore, to consider what cases come within the purview of the act, because a settlement is not gained by the purchase of such an estate, unless the price paid for it amount to 30l. and the value is of no importance in any other case.

Of cases not within 9 Geo. I. c. 7.

"The 9 Geo. I. was intended to prevent parishes from being fradulently incumbered under small fraudulent conveyances; and it only intended to exclude all purchases of cottages under the value of 30l. from giving a settlement longer than the continuance of the interest; for a man ought not to be hindered from living upon his own, and being irremoveable from it as long as his property continues, and he continues to reside upon it. (1)

Object of 9 Geo. I c. 7.

The word purchase, therefore, is not to be taken in its largest extent and strict legal sense. The act does not extend to devises, or gifts, or other methods of acquisition, but is confined to the particular case of purchase for a money consideration under 30l. For, on the contrary construction, no estate by devise, or gift, or marriage-settlement, could confer a settlement, unless a pecuniary consideration was paid. (2)

Definition of a purchase under the act

It has been held, therefore, not to extend to conveyances purely voluntary.

Don't extend to voluntary conveyances.

(1) Per Ryder, C. J. Rex *v.* Marwood, Burr. S. C. 386. See also the opinion of Lawrence, J. in Rex *v* Martley, 5 East, 44.

(2) Rex *v.* Marwood, ante, 61. (2). But Rex *v.* Sawbridgeworth, 2 Sess. Cas. 161. Burr. S. C is contra

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Conveyance to a married daughter "in consideration of natural love and affection," reserving the standing of a bed.

The pauper and his wife were removed from Kentisbury to Marwood, and the order was unappealed from. They were afterwards committed to Bridewell for returning to K. without a certificate. Some time after, the wife's father being possessed of a cottage-house, garden and plot of ground in K. for the residue of a term of ninty-nine years, determinable upon the life of J. S. (the consideration-money for the purchase whereof amounted to but 20s.); in consideration of *his natural love and affection* to his said daughter, did give and grant the premises (except the standing of a bed in one room, and a way to and from the same) to his daughter, being then the wife of the pauper, and afterwards in trust for her daughter during his interest therein. This gave a sufficient estate to the pauper to entitle him to a settlement. (1)

Conveyance to a son-in-law.

Neither does it make any difference, that the estate is conveyed from natural love and affection by the wife's father to her husband.

Feoffment in consideration of love and affection, and 10s, to a son in law, and his heirs, &c.

The father of the pauper's wife, being seised in fee of a plot of ground, twenty yards square, of the value of a guinea, by indenture of feoffment between him, J. D. (the pauper, and Mary his wife, in consideration of the marriage, *then lately had and solemnised* between the said

(1) Rex *v.* Marwood, ante, 63. (1) Rex *v.* Ingleton, S. P. Grant of a cottage, value 4l. per annum, by pauper's father in-law to the wife for life, remainder to the use of her daughter, confers a settlement, where the residence is under a certificate, Burr S. C. 560. Many cases cited here were determined under the Certificate Act, 9 & 10 W. III. c. 11. the words of which are very strong, viz. "that no person "shall procure a settlement in any pa-"rish, into which he has been certi-"ficated, unless he shall really, and "*bonâ fide*, take a lease of a tenement "of the value of 10l., or shall execute "some annual office." But the Court have made the same construction upon that act as upon 13 & 14 Car. II. See Rex *v.* Stanfield, Burr. S. C. 205. The opinion of Lord Mansfield, Rex *v.* Cold Aston, Burr. S. C. 450. post. Rex *v.* Ufton, 3 Term Rep. 251. But the opinion of Ashhurst and Buller, J. Rex *v.* Warblington, 1 Term Rep. 241., seems contra as to voluntary grants. But see post. chap. xxviii. sect. 3.

J. D.

J. D. and M. his wife, and for the regard and natural affection which he had to them, and of ten shillings in hand paid, did give, grant, alien, infeoff, and confirm unto the said J. D., his heirs and assigns, all that plot of ground, &c. to hold to the said J. D. and M. his wife, their heirs and assigns, to the only proper use and behoof of the said J. D. and M. his wife, their heirs and assigns for ever. No consideration of 10s. was paid to the grantor, nor was there any promise or agreement whatsoever, before the marriage, to convey the premises. It was argued that J. D. took no estate by operation of law in right of his wife, and if he took any, it was by grant to himself, which, being within the statute (1), conferred no settlement. The grant conveyed nothing to the wife, because the premises of the deed limits the estate to the husband and his heirs, and it is settled that the habendum cannot lessen an estate expressly given by the premises (2). The habendum therefore which attempts to give a joint estate to the husband and wife, is repugnant and void; and if it be void, the subsequent use limited upon it must be void likewise. Then, as the wife took no legal estate, the feoffment to the husband could enure only to the grantor and his heirs, for natural love and affection to the son-in-law, one not of the grantor's blood, could not, after marriage, raise a consideration to the grantee. It conveyed no interest to him, therefore, for want of consideration.

to hold to him and his wife, and their heirs, &c. to their use, &c.

Then as to the argument, that by a subsequent limitation of the use a moiety passed to the wife, this might have been true, had the use been well limited, as if it had been habendum to the husband and his heirs to the use of the wife and their heirs; for there must be somebody to stand seised to the use for an instant; and the person to stand seised, and those to whom the use is given,

(1) 9 Geo. I. c. 7. (2) Baldwin's case, 2 Term Rep. 23.

 can-

cannot be the same, which would be the case under the construction contended for; and though a case may exist in which natural love and affection may be sufficient to support a covenant to stand seised to uses, it can only be when the deed cannot otherwise have any effect, whereas there is here a good resulting use to the grantor and his heirs. But the court were of opinion, that J. D. gained a settlement; for, 1st, although the habendum cannot control the premises of a deed, the subsequent uses which are declared may; and if the habendum is rejected altogether, as surplusage, the true meaning and legal effect of the limitation will be, a conveyance to the husband and his heirs, to the use of the husband and wife, and their heirs, who therefore took a joint estate in fee. But, 2d, The money consideration inserted is only the form of the conveyance (1); and supposing that the wife took no estate, it is a good conveyance as a gift to the husband, and not within the statute which means only a purchase for money, or some other such valuable consideration, and cannot possibly apply to a conveyance like the present which is the transfer of a family estate, from one branch of the family to another, in which the particular facts, as well as the general nature of the transaction, negative all idea of fraud. (2)

Consideration of a mixed nature.

So also, if the consideration is of a mixed nature, being partly for a sum of money (inadequate to the worth of the estate) and partly for natural love and affection, it is not a pecuniary purchase within the act.

(1) Buller, J. " I doubt much whether the court ought to take notice of the fact, that no money was paid. We know that in all family settlements, the nominal consideration is inserted in order to make the deed valid, though in fact it is never paid. To admit evidence against the receipt, or even enter into such inquiries, would be dangerous to titles in general, and hardly any conveyance in the kingdom made to trustees would stand." Rex *v.* Ashton Underhill, Cald. 423.

(2) Rex *v.* Charlton, Cald. 416. 2 Bott, 493. Pl. 511.

A father

A father being possessed of a cottage and premises, in consideration of natural love and affection, and of 10l. paid him by the son, granted, enfeoffed, and confirmed the said cottage to his son in fee. The son, after residing there several years, sold the premises to J. S. for 50l. The court were of opinion, that this, being a donation from a father to a son, was not within the statute. For they were bound to take notice, that the conveyance was in consideration of natural love and affection, as well as 10l., and could not suppose that 10l. was the real value of the estate; as the case itself states, that it was afterwards sold for 50l. (1)

Conveyance to a son in consideration of natural love and affection, and 10l.

But if a monied consideration, although ever so small, is the sole foundation of the grant, it is to be considered as a purchase within the statute, and not as a voluntary gift. As where the lord of a manor granted a piece of the waste of the value of thirty or forty shillings at a "fine one shilling, heriot one shilling, quit-rent one shilling;" it was held a purchase within the statute, although part of the reservation was annual, and part contingent. (2)

When the consideration is solely money, no settlement is gained, be it ever so inadequate in value. Annual and contingent reservation in a grant by lord of a manor for a piece of the waste, "1s. fine, &c."

It seems, further, that where the consideration is not set forth in the conveyance, the proof lies on the party claiming the settlement, to shew the grant voluntary, at least where it is to avoid a certificate. (3)

Proof of consideration not set forth in conveyance, lies on

To bring the case within the statute, the party must be a purchaser in the legal sense, *i. e.* the original acquirer of the estate. Where there has been an old lease of a cottage many years in the family, and the tenant possess-

To be within 9 Geo. I. party must be the first acquirer.

(1) Rex *v.* Ufton, 3 Term Rep. 231. It avoided a certificate.

(2) Rex *v.* Warblington, 1 Term Rep. 241.

(3) Rex *v.* Warblington, ante, (2).

Surrender of an old lease, and grant of a new one.

ing a moiety in right of his wife, and the other, by purchase from her brother, surrenders the whole to the lady of the manor, who in consideration thereof, and thirty shillings, grants him a new one for ninety-nine years at the old rent; this is not a purchase within the meaning of the statute, and does not prevent a settlement being acquired by residence. (1)

Estate by devise confers settlement.

An interest acquired by devise confers a settlement. As where a father devised a house and premises worth forty shillings a year to his daughter (who was married), for life, and after her decease, to her son, paying 5l. to his sister, and died. The daughter's husband gained a settlement by residence thereon during his wife's life. (2)

Devise of a leasehold.

So where a father being possessed of a cottage, &c. demised to him for ninety-nine years, at five shillings *per annum* (being the full and most improved rack rent), devised it to his son, and made him sole executor, and the son proved the will. It procured a settlement; for though a leasehold, it was the pauper's own estate, as he came into it under his father's will (3). So where a mother who rented a farm devised it to her five children, making the pauper and her three other sons executors, and died. The pauper alone proved the will, and entered upon the farm as her executor, and managed it for twelve or thirteen weeks: he gained a settlement.—*Per* Yates J. "If persons voluntarily come into parishes to settle in tenements under the value of 10l. a-year, the act of 13 & 14 Car. II. c. 12. prevents their gaining a settlement by their intruding into parishes as strollers and vagabonds,

Devise of a leasehold to five children, making four sons joint executors.

(1) Rex v. Tarrant, Launceston, Trin. 24 Geo. III. Cald. 209. Semble. Per Lord Mansfield, C. J.

(2) Rex v. Shenstone, Burr. S. C. 468.

(3) Rex v. Sundrish, Burr. S. C. 7. The devise of this and other estates was on condition that the son should pay or secure to his mother 20l. towards her maintenance, and it did not appear that he had either paid or secured it.

and

and with the bad intentions mentioned in the preamble of the statute: but if an interest in a tenement of *ever so little value* devolve upon a person by act of law, it is quite a different case, and by no means within the provisions, or purview, or the intent of the statute." (1)

So also an executor who is possessed of an estate from year to year under a will, gains a settlement by entry and residence, although he has not proved the will. For first, the estate is sufficiently permanent, the executor having the interest his testator had, *i. e.* the right to continue on the estate another year, unless six months notice is given (2). Second, with respect to the objection arising from the want of the probate, there is a case in Dyer (3) which gives a decisive answer to that: a termor devised his term to another whom he made his executor, and died: the devisee entered, and died without any probate; and it was held, that the term was legally in the executor by his entry, and an execution of the devise without any probate. (4)

Executor possessed of an estate held by testator from year to year. Proof of the will by executor unnecessary to give him a settlement.

So also a sufficient estate is gained in a term of years, by taking out letters of administration.

An estate in administrator taking out letters of administration.

A cottage of the value of thirty shillings a-year demised for ninety-nine years, at one shilling rent, was assigned in trust by the tenant; after the death of the *cestui que trust*, his wife became entitled to the term as administratrix; she demised part of the cottage by lease, and married a

Administratrix to cestui que trust of a lease.

(1) Rex *v.* Uttoxeter, Burr. S. C. 538. Rex *v.* Woburn, Burr. S. C. 785. post. 79. (2). See ante, 42.

(2) Cites Doe *v.* Porter, 8 Term Rep. 13.

(3) Dyer, 367. a.

(4) Rex *v.* Stone, 6 Term Rep. 295. See also Rex. *v.* Netherseal, 4 Term Rep. 258. ante, 34. (1); and see Rex *v.* Oakley, 10 East, 491. case of a guardian in socage, post. 80.

second husband, who resided upon the premises, and thereby gained a settlement. (1)

Estate acquired by marriage.

It appears from this, and others of the foregoing cases, that the husband may acquire a settlement by possession of an estate, which comes to him by marriage, in right of his wife. As where an estate descends (2), or is given to her by her father either before (3) or after marriage (4). A cottage was given to a woman by deed, by a person who was the owner of it upwards of thirty years. The woman afterwards married, and her husband gained a settlement by residence there. (5)

Woman purchases a lease for 6l. then marries, her husband is settled, and she through him.

So where a woman purchased a leasehold tenement for 6l. and afterwards married, and her husband resided on the premises, and died. This is a settlement to the husband by intermarriage; for upon marriage, the wife's estate vested in him by law, and although she could not gain a settlement by her purchase upon 9 Geo. I. c. 7. yet her husband having acquired one by it, the widow thereby derived a settlement through him. (6)

Otherwise where husband purchases under 30l. after marriage, and settles it to his wife's separate use.

But if the estate was originally purchased by the husband for less than 30l. and settled after marriage in trust to the wife's separate use, he cannot gain a settlement by reason of the equitable estate vested in his wife. For this conveyance being the voluntary act of the purchaser,

(1) Mursley *v.* Grandborough, 1 Str. 97.

(2) Ashbrittle *v.* Wyley, ante, 62. (4).

(3) Supra.

(4) Rex *v.* Marwood, ante, 63. (1).

(5) Rex *v.* Brungwyn, 2 Bott, 413. Pl. 502. They resided 17 years.

(6) Rex *v.* Ilmington, Burr. S. C. 566. The settlement is acquired in all these cases by the husband, and through him conferred on the wife; for she cannot acquire a settlement during his life-time by residence on his estate, or otherwise. See Rex *v.* Aythorp Rooding, Burr. S. C. 412. and ante, 58. See also Rex. *v.* South Lynn, 5 Term Rep. 664. ante, 55. (3). Rex *v.* Painswick, ante, 61. (5).

cannot

cannot confer a greater right on him than he had before. (1)

And if husband and wife are joint purchasers of an estate for a less sum than 30l. the survivor is a purchaser within 9 Geo. I. c. 7., and does not acquire a settlement, for they take by entireties and not by moieties, so that the whole interest vests in the survivor as a purchaser, by right of survivorship. (2)

So if they are joint purchasers under 30l. the survivor gains no settlement.

The *jus proprietatis*, or mere right of property, is unnecessary to the gaining a settlement; if the party has the right of possession, which he can maintain in a possessory action, it is sufficient, although he has not a complete indefeasible title, or, as it is called in the old books, *Juris et seisinæ conjunctio*. (3)

Right of property unnecessary to a settlement; right of possession sufficient.

The reason of this seems to be, not only that the right to occupy renders the party irremovable, but also that length of possession is *prima facie* evidence of title, and the court will not permit the title to the estate to be determined in an order of removal. (4)

Title to an estate not to be determined in an order of removal.

The right of possession may be acquired in several ways. As where the title is by disseisin, and a descent is cast; the heir to whom the estate has descended acquires a settlement, although the ancestor gained possession by a tort. A. built a cottage upon the lord's waste, he lived on it thirty years and died, when it descended to his daughter; she lived on it with her husband for three

Right of possession by descent which tolls entry.

Title by 30 years possession.

(1) Sembl. Rex *v.* Tarrant Launceston, Hil. 43 Geo. III. 3 East, 226. post. 75.

(2) Rex *v.* Dunchurch, Burr. S. C. 553. where it was held that the parties residing under a certificate, did not acquire a settlement.

(3) See 2 Black. Com. 195. et seq.

(4) Ashbrittle *v.* Wyley, 1 Str. 608. Rex *v.* Butterton, 6 Term Rep. 554.

quarters of a year. The husband gained a settlement. For after an enjoyment of thirty years, during which the lord claimed nothing, A. had an undoubted title against all the world but him, and even against him it may be doubtful, after so long a possession. In ejectment he might either make or defend a title by twenty years possession. (1)

20 years occupation gives title, however the party came into possession.

An undisturbed possession for twenty years is in itself sufficient to acquire a settlement, and the mode how the occupier came into possession is not material (2), whether by right or by wrong. (3)

20 years possession by one of five children of an intestate lessee.

W. F. being possessed of a tenement and two acres of land for the residue of a term of ninety-nine years, determinable on the death of himself and his daughter Mary, died intestate, leaving the pauper's wife Mary and five other children. The pauper took possession, and occupied the premises above twenty years.. He gained a settlement, although it did not appear that any administration had been taken out. For 1st, the pauper had acquired a positive right, by twenty years possession, upon which he might have brought an ejectment. 2d, There is a presumption, that the pauper and his wife had agreed with the other children for their shares. (4)

Possession nineteen years and a half by an intruder on the waste, and the remainder of twenty by his mortgagee.

The pauper built a cottage on the waste of the manor, not having a lease of the ground, or licence to build it; he lived there nineteen years and a half without interruption, but paying neither rates nor taxes.. He was then turned out of possession by ejectment brought by a person to whom he had mortgaged the premises, who continued in possession until the entire time of possession was more

(1) Ashbrittle *v.* Wyley, ante, 71. (4).

(2) Per Dennison, J. Rex *v.* Cold Ashton, Burr. S. C. 451.

(3) Per Wilmot, J. ib.

(4) Rex *v.* Cold Ashton, Burr. S. C. 444.

than

than 20 years, after which he and the mortgagee sold it. This was held a possession of more than twenty years, and conferred a settlement. For the pauper was in possession nineteen years and a half, and the mortgagee's possession must be also considered as his. (1)

A cottage was built on the waste by the pauper's father above seventy years back; the pauper resided there upon his father's death, and paid an acknowledgment of two shillings and sixpence to the lord of the manor for the last thirty years, but it did not appear that the father had paid any. He gained a settlement. (2)

Possession by descent after paternal occupation of 30 years, and an acknowledgment to the landlord.

And it seems that the Court does not require that strict statutory title by adverse possession of twenty years, which is necessary in questions of title in ejectment. But they will presume a conveyance to legalize the possession in cases of long and uninterrupted enjoyment, unless the contrary appears.

Conveyance presumed from peaceable enjoyment less than 20 years.

R. O. having purchased a piece of land in fee, gave his son-in-law J. H. the pauper's father, a part of it, but it did not appear that he ever executed any conveyance thereof. J. H. built a house on it, which cost him above 100l.; resided on it fourteen or fifteen years without paying rent or acknowledgment to R. O., when he quitted it, and received the rent until his death, three years after. R. O. died in the life-time of J. H., leaving another daughter and grand-children by a son pre-deceased. Lord Kenyon, C. J.—"As twenty years have nearly elapsed since the time when this land was given to the pauper's father, and as no claim has ever since been made, either on the pauper or his father, the case of Ashbrittle *v.* Wyley (3) is an authority to shew, that the Court

Grant of land without conveyance, grantee builds a house, &c. and occupies 18 years.

(1) Rex *v.* Bitton, Burr, S. C. 631. 2 Bott. 482. Pl. 501.

(2) Rex *v.* Garway, Burr. S. C. 632.

(3) Ante, 71. (4).

ought

ought not to permit the title to the estate to be determined on an order of removal. The strict rules to be observed on the trial of ejectment, ought not to be applied to settlement cases. After such a length of time as this, perhaps a conveyance may be presumed to be executed. And in Rex *v.* Cold Ashton (1), where there had been a possession for nearly twenty years, Wilmot J. said, there ought not to be a nicety of computation in a settlement case, but the Court may presume a conveyance. And even if no conveyance were executed to the pauper's father, and a claim were now made by Oakden's heir at law, he would perhaps be told in a court of equity, that as O. stood by while the pauper's father built on this land, and treated it as his own, he could only resume the possession on certain terms." (2)

Settlement by possessing equitable interest.

A settlement may be gained by the possession of an equitable interest, subject to the same rules as a legal estate.

The true question whether premises substantially the pauper's property.

In judging upon these questions, the court has always gone on the substantial right and truth of the case, independent of the form of the conveyance. If the estate be substantially the pauper's property, whether the title be legal or equitable, whatever the exterior form of conveyancing, this is sufficient; and therefore in the case of a mortgage, either a mortgagor or a mortgagee may acquire a settlement (3); the mortgagor may, for the mortgagee, whatever the form be, has no more than a chattel: the mortgagor is the

Mortgagor may gain a settlement,

(1) Ante, 72. (1).

(2) Rex *v.* Butterton, 6 Term Rep. 554.

(3) This has no reference to the question of value under 9 Geo. I. c. 7.

real

real owner, and has in equity the property of the land."(1)

And if the object be merely to secure money, it is in substance the same thing, whether the conveyance be in the form of an absolute disposition in trust, or of a mortgage.

whatever conveyance he makes merely to secure money.

The pauper's wife, previous to marriage, purchased the lease of a cottage for ninety-nine years determinable on lives, it was afterwards conveyed by her, and her first husband, to a trustee in trust, that he should by sale or mortgage raise 10l. for the benefit of the parish, by whom the family had been before relieved to that amount, together with interest and charges; and after payment thereof in trust to re-assign the premises. The parties always continued in possession, and it did not appear whether the money was ever paid, or what the value of the cottage was. The first husband dying, the pauper married the widow, who continued in possession; and held that he gained a settlement by residing forty days. For this is a conveyance for the purpose of securing monies, and whether it be in form of a trust, like the present, or of a mortgage, it is substantially the same thing; for this is virtually no more than a mortgage, and must be governed by the same rules. (2)

Conveyance to a trustee to raise money by sale or mortgage and after payment to reassign, &c.

Samuel Daniel was seised of a copyhold estate for life, to which, by the custom of the manor, the widow was entitled to her free bench. He had a grand-daughter married to Thomas Gifford. S. D. being about to marry

Possession by a grandson under a bond which a woman, about to

(1) Per Lord Mansfield, C. J. Rex v. St. Michael's, Bath, Cald 110. Doug. 629. ante, 42. (1). See also Rex v. Catherington, 3 Term Rep. 771. post. 86. (2). Rex v. Eddington, 1 East, 288. post. 2.

(2) Rex v. Eddington, 1 East, 288. ante, 1.; and see the distinction between this case and Rex v. Tarrant Launceston, ante, 71. (1).

Mary

marry his grandfather, gives to secure him peaceable enjoyment of premises, in which she would be entitled to free bench on surviving her intended husband.

Mary Tucker, she executed a bond to T. G. in 100l. The condition recited the intended marriage, and that if M. T. survived her intended husband, he dying seised of the premises, she would be entitled to her free bench, and that M. T. had agreed she would permit T. G. and Susannah his wife, (grand-daughter of S. D.) their executors, &c. to hold and enjoy, and for their own benefit to receive and take the rents, issues and profits, of all the said copyhold premises, except the west end of the dwelling house, which M. T. reserved for her own use, and thirty-two gallons of cyder, to be made from the fruit in the orchard, at the expence of T. G. and his wife, who were also to repair the said west end of the dwelling-house; and M. T. also agreed, that if she married again, whereby T. G. and his wife would be deprived of the premises, she would pay T. G. 60l. S. D. died five years after his marriage, leaving M. T. his widow, who gave up possession of the premises to T. G. and his wife, according to the stipulation in the bond, and they continued in it till their deaths, when T. G. who survived his wife, devised the premises to be sold for payment of his debts, and the surplus to be divided among his children, the paupers. T. G. gained a settlement by his residence on the estate. For this was an agreement for a valuable consideration, of which a court of equity would have compelled the performance, and the widow was so satisfied, she was bound by the bond, that, on the death of her husband, she delivered up possession according to her contract. This man then, so in possession, had a good title against all the world but the widow. Nay, the widow herself was so far bound by the bond, that she could not recover in ejectment. (1)

B. de-

(1) Rex *v.* Lopen, 2 Term Rep. 577. But quære of this last position; "for, although the conveyance of the legal estate may be presumed to be in the possessor from his beneficial occupation, yet if it appear that the legal estate is outstanding in another person, the party not clothed with it, cannot recover

B. devised a farm to trustees in fee, to dispose of the rents, issues, and profits, as to 40s. a-year, to the poor of the township; and the residue to be paid to a schoolmaster to be nominated by them, to teach the poor children of the town to read the bible. C. D. heiress-at-law of the surviving trustee, and J. D. her husband, by an agreement in writing, reciting that the husband in right of his wife was possessed of and entitled to a school-house, yard, garden, and premises at M., which they had agreed to let to W. G. for the purposes therein mentioned, thereby agreed that the said W. S. shall have the possession, use, and occupation of the said school-house, yard, garden, and premises, for the purpose of teaching the poor children of the said parish of M. to read in the bible, in pursuance of the will, devise, and bequest of B. deceased; and in consideration of W. S. agreeing to teach the said children, he is to reside on the premises rent free, and to be paid by J. D. and C. D., or the survivor, 10l. for the first year, and 15l. for every year that he shall afterwards continue to teach the said children as aforesaid; with power to the trustees, upon reasonable complaint, to suspend the salary, and in case of his death to turn from off the premises his executors, administrators, or assigns, and to appoint another person to the situation of schoolmaster. The annual value of the school-house, yard, and garden, was 5l. and the remaining premises were let by J. D. at 52l. 10s. per annum. The sessions considered the appointment fraudulent, and in no respect consistent with the will; but the court thought that they meant by this finding, not that

Possession given by trustees to a schoolmaster of part of the premises he was entitled to.

recover in a court of law; and I cannot distinguish between an ejectment brought by a trustee against a cestui que trust, and an ejectment brought by any other person." Per Lord Kenyon C. J. Roe *v.* Read, 8 Term. Rep. 118. Doe *v.* Dixon, ib. 2. Doe ex dem. Hoddesden *v.* Staple, 2 Term Rep. 684. Doe *v.* Wroot, 5 East, 132. Weakely *v.* Rogers, ib. 138. n. a. and the cases there cited.

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it was a colourable appointment under which he was not to discharge the duties of schoolmaster, but that it was an appointment upon such terms as tended to deprive him of a great part of the emoluments attached to his situation. The fraud was not in him, but in those who attempted to withhold them. He was to the extent of all but 40s. a-year the *cestuy que* trust of the farm, and had the trustees kept in their own hands sufficient to raise that sum and put him in possession of the remainder, they could not dispossess him while he continued schoolmaster, unless he misused the property, or what they retained proved insufficient to raise the 40s. a-year. W. S. was allowed to have possession of the house, yard, and garden, and the trustees retained greatly more than was sufficient to answer the 40s. a-year. W. S. had this possession, therefore, not by purchase so as to be within 9 Geo. I. c. 7., nor by renting so as to be within 13 & 14 Car. II. c. 12., but in the character of a *cestuy que* trust residing upon what was for the time substantially his own, and as the trustees could not have removed him; a residence for 40 days gave him a settlement in the parish. (1)

Estate devised in trust to be sold, and produce divided. Possession by one legatee with consent of the rest.

E. B. devised a copyhold and freehold estate to trustees to be sold, and the money arising from the sale to be equally divided between R. B. the pauper, and the three daughters of W. B. share and share alike. R. B. entered upon the copyhold upon E. B.'s death. By agreement between the legatees, the daughters took the ready money of the testatrix, and R. B. the freehold. In pursuance of this agreement, the freehold was conveyed to him by the trustees, and the daughters by the same deed released their interest, not only in the freehold, but also in the copyhold premises. No further conveyance of the latter

(1) Rex v. Owersby le Moor, 15 East, 356.

I was

was made to him; but at a court holden for the manor, he was admitted in fee to this messuage, as cousin and heir at law to the testatrix. He occupied both for 11 or 12 years until his death; it was held, that he had such an equitable interest in the estate, as with residence conferred a settlement. A devisee of the surplus arising from the sale of lands after payment of debts and legacies, has an equitable interest in the lands themselves, it being in his option to pay the debts and legacies and keep the land. (1)

A. L. entitled to a long term of years in a cottage, devised as follows: "I give and bequeath to my kinsman A. P. and his heirs, all and whatsoever I shall die possessed of, &c. paying certain legacies herein mentioned; also, it is my will and pleasure, that my kinsman W. P. the elder, his wife and children, shall have free liberty and power, during their natural lives, to dwell in the same house they now live in" (which was the cottage above mentioned). This devisee gave such an estate to W. P. as discharged his certificate under which he dwelt in the parish where the cottage was, and gave him a settlement. (2)

Testator inserted this clause: "It is my will that W. P., his wife and children, shall have free liberty, during their lives, to dwell in the same house they now live in."

A cottage, held for a term of years, was conveyed in trust to the use of the husband; he died, and his wife became entitled to the term as administratrix; she mar-

Title as administratrix to cestui que trust.

(1) Rex *v.* Wivelingham, Doug. 767. Cald. 121. Roper *v.* Radcliffe, 9 Mod. 167. 181. 10 Mod. 231. 1 Bro. Par. Cas. 450. Foone *v.* Blount, Cowp. 467. Rex *v.* Natland, Burr. S. C. 793. S. P. cor. Gould, J. and recognized as law by Lord Mansfield, ib. The case was put upon the pauper's title under the will, because the premises were under the value of 30l., and it was argued by the counsel against the settlement, that the conveyance from the trustees and other legatees, was a purchase. See also Rex *v.* Tarrant Launceston, ante, 71. (1).

(2) Rex *v.* Woburn, Burr. S. C. 785. Perhaps this case should be classed more properly under the head of legal estates.

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ried again, and her second husband acquired a settlement by residence. (1)

Husband of guardian in socage residing on ward's estate.

T. H. 38 years before, inclosed a piece of waste land and built a cottage thereon, which he occupied till his death. In 1795, he and his son mortgaged the premises for a term of 500 years, to secure 20l. which remained unsatisfied. The son married, and his father afterwards dying intestate, he, as the heir at law, continued there for six months, when he likewise died, leaving a widow and four daughters, three of whom were under 14 at the time of the removal. The widow continued to reside on the premises with her daughters more than 40 days before the eldest attained the age of 14, and two years afterwards married the pauper, and with him and the children continued to reside there upwards of 40 days previous to her removal, the estate then being of less annual value than 10l. The Court were of opinion that a settlement was gained. For the mother, who was guardian in socage to her daughters, had a right to elect whether she would let the estate, or occupy it for their benefit and use; and unless she let it, the law, which imposes the duty of a guardian upon her, would necessarily protect her in the personal occupation and superintendance of it. The only difference which can be pointed out between the cases of an executor or administrator and a guardian in socage in this respect is, that the one is accountable for the profits by statute and the other at common law; and in order to make persons irremovable on account of having property in the parish, it is not necessary to have a beneficial interest in it for themselves, but it is sufficient that they reside there for some beneficial purpose to another. (2)

(1) Mursley *v.* Grandborough, ante, 70. (1).

(2) Rex *v.* Oakley, 10 East, 491.

The pauper's father purchased a cottage and land for less than 30l. and died, having devised by will this estate, being under the annual value of 10l. to a trustee, to let it to farm during the pauper's natural life, and pay the rents thereof to her, deducting the expences; and after her death, in trust for the use of his right heir. The pauper was held to gain a settlement by a residence of more than 40 days after her father's death, the trustee never having interfered. For this species of settlement does not depend upon any term in a statute, but is an excepted case in the law, standing upon the rule that a man shall not be removed from his own, while his trustee permits him to occupy it, and from which nobody else has a right to remove him. The pauper did not reside in the character of tenant, and whether the estate was legal or equitable, it was her own, and she could not be removed from it by an order of justices. (1)

Residence of cestuy que trust only, in term of devisee in trust, gains a settlement

So, also, residence by the husband on an equitable estate of the wife's has been expressly decided to give a settlement. A house was vested by marriage settlement in trustees to the separate use of the wife, with the usual clause, "that her receipt should be a discharge to the trustees for the rents and profits, and that the rents should not be subject to the husband's debts, &c." The husband and wife lived in the house, and thereby gained a settlement, for the wife had a right to reside on her property, and to communicate it to her husband. (2)

Residence by husband on wife's equitable estate

But as the foundation of the settlement is the party's interest in the premises, he must have either a legal or equitable title to an interest in possession. (3)

But there must be legal or equitable interest to give a settlement.

(1) Rex *v.* Holm, East and Waver Quarter, 16 East, 127.

(2) i.e The right of residing, Rex *v.* Offchurch, 3 Term Rep. 114.

(3) See the opinion of Lord Kenyon, C. J., Rex *v.* Chailey, 6 Term Rep. 755.

Fee descends to wife, and is not reduced into possession during her life.

An estate in fee descended to a married woman, who died without either she or her husband making an entry on the premises, or receiving the rents or profits. The husband gained no settlement by residence after her death, for the heiress did not reduce the estate into possession: and in order to make the husband tenant by the curtesy, there must be a seisin in fact in the wife. (1)

To gain settlement by curtesy, wife must be actually seised.

A grandson went upon his marriage to reside upon a cottage belonging to his grandfather, who agreed to make it over to him, and an agreement to that purpose was offered in evidence, but could not be received for want of a stamp. The pauper fitted up the cottage, and resided on it as his own, with uninterrupted possession for 13 years, without paying any rent, or any thing being ever claimed of him by any person in respect of it. The grandfather died a year after the pauper came into possession, leaving the pauper's mother his heir at law. The husband did not, upon her death, become tenant by the curtesy; because, in order to make him so, there must be a seisin, in fact, by the wife (2); and as she did not reduce the estate into possession, it descended to her son, who being seised in fee, gained a settlement by residence on the premises. (3)

Quarantine. Husband gains no settlement by wife's right to dower, unless assigned.

So also where J. A. being seised of a house and orchard in Stock, died, leaving a widow and one son. The widow, after his death, put the house in repair, and entered upon it with the orchard. Seven years after she intermarried with W. S. who was settled in Painswick, but resided in the house in Stock with his wife and two children of the marriage till his death, which happened two years afterwards. The widow after his decease conti-

(1) Rex v. Great Farringdon, 6 Term Rep. 679. ante, 62. (4).

(2) Co. Lit. 15. b. 29. a.

(3) Rex. v. Great Farringdon, 6 Term Rep. 679.

nued to live there for six years and better. The Court were of opinion, that the widow gained a settlement for herself in Stock, by residence during her quarantine after her first husband's death. But they held, that as no dower was actually assigned, the mere right to it, coupled with residence, did not give a settlement to the second husband there, and that she could not communicate that which she had so previously gained, to him and her children by him. (1)

Possession by one entitled to administration, without taking it out, gives no settlement.

Upon the same principle, possession of a chattel interest, by a person who is one of those entitled to administration of the intestate's effects, is not sufficient, unless letters are taken out during continuance of the interest. (2)

Possession of leasehold by intestate's son, who took administration after term expired, insufficient.

The pauper's father, who was possessed of the residue of a term of years in a cottage of the yearly value of thirty shillings, died without a will, leaving the pauper, and another son, who was still living, and took his distributive share, and part of his father's estate and effects in goods. The pauper continued in possession of the house for five or six years, until the term expired; after which, and after making an order for his removal to another parish, he took out letters of administration; but was held not to have acquired a settlement. For per Probyn J. though "if he had taken out administration during the interest, he had a vested right, yet taking out administration after the term expired, could never give him an interest in the expired term, in which he had none dur-

(1) Rex. v. Painswick, Burr S. C. 783.

(2) This differs from the case of an executor, for he acquires a settlement by possession of a term under a will before probate, because proof of the will is unnecessary to vest the interest in him.

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ing its subsistence (1). He was in the possession merely as a tenant at will, he was removeable by the parish, *and his right would have been without foundation, if administration had been granted to any one else*." Chapple J. — "There was no time during the continuance of the lease when the pauper was irremoveable; and without remaining forty days irremoveable, a settlement could not be gained by him. And he observed, that there was no agreement at all between the brothers that the pauper should take the lease as his distributive share, or at least no such agreement appeared. It is only stated, that the other brother did take his share in the goods, and John (the pauper) did live in the cottage; but it does not appear that this happened in pursuance of any preceding agreement that it should be so." (2)

Also where a person was solely entitled to the administration *durante minore ætate*, but the intestate's children, being minors, had a joint interest in the term, it has been decided that administration must be taken out to procure a settlement.

(1) Rex *v.* Widworthy, Burr. S.C. 109. See also Rex *v.* Cold Ashton, Burr. S. C. 444. ante, 72. (4). It is said to have been holden, that the next of kin must vest his right to a term, by taking out administration to the affairs of the intestate. South Sydenham *v.* Lamerton, Cas. Sett. & Rem. 103. See the opinion of Lord Kenyon, C. J. Rex *v.* Offchurch, 3 Term Rep. 114. But the case went off upon another point. See the other reports of the case, 1 Str. 57. Fol. 93. 10 Mod. 388. 1 Sess. Cas. 122. No. 115. See Rex *v.* Horsley, 8 East, 411.

(2) Rex *v.* Widworthy, ante, (1), and the cases there cited. Page, J. put this case on the ground, that administration having been taken out, after the order of removal, the sessions could not have quashed the order, though administration had been afterwards taken out, for they could not quash a good order of removal by a matter which happened ex post facto. S. P. per Lord Ellenborough, C. J. Rex *v.* Horsley, 8 East, 411. and in Rex *v.* North Curry, where the widow, entitled to administration, sold the term, pending an appeal against an order for her removal, and afterwards took out letters of administration, she was held not to acquire a settlement, although the term in the premises was unexpired. See post. 85. (2), and see Rex *v.* Horsley, post. 86. (1).

A cot-

A cottage and garden, of the yearly value of twenty shillings, was in consideration of 14l. 14s. demised to S. W. the pauper's husband, for ninety-nine years, determinable upon three lives, at two shillings rent. He died intestate, leaving his widow and four infant children survivors. She resided above six months, and then sold the premises. Between two and three months after which, she took out administration to the effects of her husband. Lord Mansfield — "In these cases we should avoid nicety of distinction. This is not materially different from the case of Widworthy (1). As the children were entitled to two-thirds, the widow is not properly, and in the sense of the cases, the sole next of kin." Ashhurst J. — "At most, more has not been said by the court, even in the case of one solely entitled in every sense, than that such case would deserve consideration." (2)

Widow entitled to a third interest, and her children jointly interested in the premises, gains no settlement without taking it out

But a sole next of kin has such an equitable interest in an intestate's leasehold property, as will confer a settlement before administration granted.

W. P. died intestate, possessed of a leasehold house in H. of 40s. *per annum*, leaving a widow and the pauper, his only child by a former wife. The widow died a month afterwards, and the pauper, who had occupied the house by her father's permission, continued to reside in it until the death of her mother-in-law. She then left the house, and let it to a tenant, who occupied it for three years, and paid her rent, the pauper still residing with her family in H. The court having taken time to consider, held, that she being, after the death of her mother-in-law, the sole next of kin, and thereby exclusively en

Sole next of kin acquires settlement

(1) Ante, 84. n. (1).

(2) Rex v. North Curry, Cald. 137. Rex v. Chew Magna, Cald. 365. S.P. But see the opinion of Lord Kenyon, C. J. Rex v. Offchurch, 3 Term Rep. 114 ante, 84 (1)

titled to the administration of her father's personal estate, gained a settlement by residing, after the widow's death, in the parish where the intestate's leasehold property lay. For it was in her power, at any time after she became sole next of kin, to clothe herself exclusively with the character and legal rights of administration. This exclusive right to acquire a legal title to the property, coupled with the actual enjoyment in the mean-time through the occupation of a tenant, gives so much colour of right to reside where the property is situated, without being removed, as to exempt such residence from being considered as a vagrant intrusion into a parish in which the party has nothing of *his own* within the purview and scope of the poor laws. (1)

[illegible]

The pauper was entitled to the equity of redemption of several houses mortgaged by his father, of which the mortgagee had recovered possession in an ejectment brought against the pauper. He afterwards obtained leave to inhabit one of the houses which was untenanted, for *the purpose of overlooking some repairs*, which he proposed to do upon the estate, with an intention to sell the same and pay off the mortgage. He resided three months, and did nothing, either towards the repairs, or the sale. He gained no settlement, for he had neither *jus in re* nor *ad rem*. (2)

A conveys to trustees to sell premises, and to pay with [illegible] [illegible] two mortgages;

The pauper being possessed of two freehold estates, conveyed them to trustees to be sold, and the money arising from the sale to be applied, first in discharge of two mortgages on the premises, next to his other creditors rateably, and the surplus, *if any*, to him, his executors,

(1) Rex v. Horsley, 8 East, 405. also Rex v. Houghton-le-Spring, 2 East, 247.

(2) Rex v. Catherington, 3 Term Rep. 771.

admi-

administrators, and assigns. Afterwards he got possession of one of the houses, his wife taking the key from a person employed to clean it, but without and against the trustees' consent. The case further found, that the value of the house was less than the amount of the mortgages and debts. The pauper gained no settlement by this residence, for he had no interest in the estate. "He made an immediate conveyance to trustees, not a mortgage, to sell and pay off two mortgages, and other debts; and when the conveyance was made, it was doubtful whether there would be any surplus. The deed says, that he shall have the surplus, *if any:* he had only a chance of a residue, and had not a right to continue a moment in possession." (1).

Neither does it make any difference that the pauper is suffered to remain in possession by the trustee, if his interest be altogether contingent and uncertain.

The pauper purchased a leasehold tenement for ninety-nine years, determinable upon three lives, for less than 30l. He afterwards, in consideration of 10l. advanced by W. D. and for other valuable considerations, conveyed the whole interest in trust to D. to let the premises, and out of the rents and profits to repay himself the 10l., and then to apply the rents and profits to the separate use of the pauper's wife during her life; afterwards to the pauper's own use for life, if he survived her; and afterwards among their children. The trustee suffered the pauper to reside in the house above forty days, until becoming chargeable, he was removed. It was argued, 1st, that although the pauper could not gain a settlement in his own right, his purchase being under 30l., yet he took a new estate in the premises by act of law, by virtue

(1) Rex *v.* St. Michael's Bath, Doug 629. ante, 42 (more fully reported).

 of

of which he acquired a settlement, either as a mortgagor in possession, or by virtue of his wife's equitable interest. But held otherwise, for this was not a residence as mortgagor. Here was no mortgage, but an absolute conveyance in discharge of a debt, which *non constat* would ever be paid; and if paid, would only raise the wife's trust estate.* It was therefore such a doubtful contingent interest, as conferred no settlement by the residence. (1)

[illegible]

And it is not only necessary that the interest should be certain; but it must likewise be vested in possession. An estate in remainder or reversion does not confer a settlement any more than one in contingency or expectation; for the party has nothing of his own to superintend, which is the reason why he is rendered irremoveable.

[illegible]

G. M. being seised of a cottage in fee by indenture of lease and release, in consideration of 36l. therein mentioned, to be paid, granted and conveyed the cottage in fee to the pauper, his son-in-law. The lease contained the following proviso: "Provided, that it shall and may be lawful for the said G. M. to live, inhabit, dwell in, *and occupy*, the said cottage or tenement, with the appurtenances, as he heretofore hath done, and now does, for and during the term of his natural life, &c." The pauper and his wife resided with G. M. for three months, until they were removed. It was held, that the word *occupy* used in the conveyance, shewed, that it was the intention to reserve a life estate to G. M., and not merely a liberty to inhabit the cottage during his life. The pauper therefore had only an estate in remainder, which was not come into possession at the time of the removal, and consequently he had not that which was necessary to confer on him a settlement, namely a present interest. (2)

(1) Rex v. Tarrant Launceston, [illegible] 43 Geo. III.

(2) Rex v. Eatington, 4 Term [illegible] 3 East 216; and [illegible] see Rex v. Edington, ante 75 [illegible]

But

But if vested in possession, it is immaterial whether the interest is defeasible by a condition. Thus, a mortgagee in possession may gain a settlement, although he holds the estate subject to redemption, upon payment of the sum lent. (1)

[illegible]

It is sufficient likewise if the interest continues during a residence of forty days.

[illegible] it continues the 40 [illegible]

On the 14th November, while the pauper resided in Blakemire a freehold estate situated there descended to his wife and her two sisters, from their grandfather, as co-partners. On the 14th December following, the pauper entered into an agreement in writing to sell his wife's share to the husband of one of his sisters; but the deeds were not executed until the end of February, or beginning of March following. He gained a settlement by residence in the parish during that time, in a cottage which he rented. For the contract by which he bound himself to sell was executory, and the conveyance was not executed until long after the forty days were expired, till when, the title remained in the pauper. (2)

[illegible]

And if the estate is vested, the premises need not be in the owner's actual occupation.

[illegible] occupation.

As where an infant of the age of six years and a half became seised in fee of a freehold estate, and resided in the parish with his grandmother, it was held that he could not be removed. (3)

[illegible]

A pauper was entitled to three copyhold and a freehold house, as heir at law to his cousin. He agreed to let the freehold house, which was in Sedgefield parish, to W. at

[illegible]

(1) Ante, 74.

(2) Rex v. Dorstone, 1 East, 296 See ante, 61.

(3) Rex v. Hasfield, Burr. S. C. 147. 2 Str. 1132. Rex v. Houghton Le Spring, 1 East, 247. See also Rex v. Dorstone, ante, (2) S.P.

3l. *per annum*, the pauper undertaking to sink a cellar, and make some repairs. W. accordingly entered and occupied the premises as a public house, and the pauper after such possession by W. went to S. for the sole purpose of sinking the cellar, and making the repairs agreed upon, during the whole of which time he resided as a lodger in W.'s house. He was held to gain a settlement upon the principle that residence in the parish in which the party has a freehold estate confers a settlement, whether he resides on the estate or not, or whether or not he is in the occupation thereof. For a man, though not in the occupation of his own estate, may have many reasons for wishing to live in the neighbourhood of it, and is entitled to the privilege of superintending it.(1)

The law is the same when the landlord has only a leasehold interest in the premises.

A pauper being entitled to a leasehold house, as her father's sole next of kin, demised it to a tenant, who paid [illegible] rent. She resided elsewhere in the same parish with her family, and was held to have thereby acquired a settlement.(2)

As between a mortgagor and mortgagee, it is the party who is in possession that gains the settlement, because it is the possession which decides as between them the right to the occupation or pernancy of the profits.(3)

It is likewise immaterial whether the party has a beneficial interest in the estate: a mere trustee may acquire a settlement, for nobody can take the estate from him, and it is sufficient that he reside in the parish forty days, and cannot be removed from it.(4)

(1) Rex v. Houghton le Spring, 2 East, 247.

(2) Rex v. Horsley, 8 East, 405.

(3) Ante, 72.

(4) Per Ashhurst, J. 6 Term R. 295, ante 63 (4). Per Le Blanc, J. Rex v. Oakley, 10 East, 491.

[illegible]

Upon the same principle a guardian in socage acquires a settlement, and also a subsequent husband in her right. (1)

Also a guardian in socage.

It has been likewise held that an attainted felon, discharged by an order of the secretary of state under the sign manual, which directed his name to be inserted in the next general pardon, having afterwards purchased a copyhold for more than 30l. to which he was admitted upon surrender formally made, and whereon he resided and received the issues and profits for more than nine years without impeachment of his title, thereby acquired a settlement, which he communicated to the unemancipated part of his family. (2)

A felon [illegible].

As to the number and connexion of the tenants, it forms no consideration in the question of settlement; they may be tenants in co-parcenary, joint-tenants or tenants in common. A tenant in common, of an estate of inheritance, may acquire a settlement (3); as also one of three co-parceners by residence in the parish (4); and as their interest is equal, it seems they may all gain settlements (5). One of four executors was settled by residence in the parish where the premises were situated, out of which their interest accrued. So also the owner of a leasehold interest acquired a settlement, although the grantor reserved a sleeping-place (6), or although the grantee demised all the premises to another, excepting a fourth part. (7)

Number and connexion of tenants immaterial.

(1) Rex [illegible] Oakley, 10 East, 491.

(2) Rex v. Haddenham, 15 East, 463, and see the same at length, post, chap. xxvii.

(3) Rex v. St. Nyott's, Burr. S. C. 132.

(4) Rex v. Dorston, [illegible]

(5) See Rex v. Dorston, [illegible] 4

(6) Rex v. Marwood, ante [illegible] Rex v. Uttoxeter, Burr. [illegible]

(7) Mursley v. Grandborough, ante, 61. (3).

Neither

or that pauper receives relief from another parish.

Neither does it make any difference, if there is no fraud, that the pauper receives relief from another parish, during his residence. (1)

SECT. II.

Of Settlement by Purchase under 9 Geo. I. c. 7.

9 Geo. I. c. 7.

The 9 Geo. I. c. 7. is confined to cases of estates acquired by purchase, for which a consideration, amounting to 30l., must be *bona fide* paid (2). It does not enable persons to acquire a settlement, but prohibits them from gaining one by an estate purchased under certain circumstances. This statute may be considered under three heads. 1st, To what estates it extends. 2d, How the value or consideration is to be computed. 3d, What amounts to a *bonâ fide* payment of the consideration.

To what estates 9 Geo. I. extends.

1st, It has been already shewn, that the act extends only to cases where the party acquires an estate or interest in lands or tenements for a pecuniary consideration. (3)

Nature of estate immaterial.

The nature and quality of the estate is of no signification. It may be freehold, copyhold, or leasehold. The consideration is usually paid at the time when the interest is acquired; but it may be made in the shape of an annual reservation, the judges seeming inclined to consider such case within the statute, at least for the purpose of excluding the party from a settlement.

(1) Rex v. Ufton, 3 Term Rep. 251.

(2) See the words of sect. v. ante, 63.

(3) Ante, 63.

W. B.

W. B. was certificated in the parish of Havent. On 20th October 1748, J. M. lord of the manor of H. granted by copy of court-roll "to W. B. and his heirs, one parcel of the waste ground, called the Gravel-pit, parcel of the manor, and within the parish of H." then of the value of thirty or forty shillings. W. B. by virtue of the grant entered on the premises, (which did not appear to have been previously granted by copy of court roll,) built a house, and mortgaged the premises for 100l. The mortgagee sold the premises in 1763; and on the death of W. B., his heir at law sold the equity of redemption to the purchaser. It appeared, by the evidence of the steward of the manor, that M. the lord was in the habit of making grants of such parcels of the waste, but never without a pecuniary consideration. No evidence was given, whether any pecuniary consideration was given for this grant, but it appeared, by a copy of the court-roll, read by consent in the court of king's bench, that W. B. was admitted in the year 1748, on the lord's grant, to one parcel of land, called the Gravel Land, and in the copy of his admission were these words—"fine one shilling, heriot one shilling, quit-rent one shilling;" and in the margin of all the copies was inserted, "fine one shilling." The court decided, that it was a purchase within the statute, and that W. B. acquired no settlement. Per Ashhurst, J.—A purchase is the acquisition of something for an equivalent. It is a *quid pro quo.* If there be a valuable consideration, it is a purchase in the legal sense, and it makes no difference whether it come in the form of a present payment, or in any other way. Here there appears to be a *quid pro quo*, from the state of the case, and from the entries in the lord's court, which have been read; for there was a fine upon admission, and there was a valuable reservation of a heriot and rent; and that is a sufficient foundation for a purchase; and there having

Grant by lord of manor, "fine, 1s., heriot, 1s., quit-rent, 1s." Premises afterwards worth 100l.; this a purchase within the act, and confers no settlement.

having been a consideration, it cannot be called a voluntary gift." (1)

Grant of a new lease, on payment of two guineas.

So, where the dean and chapter had granted a lease for lives to the pauper's grandfather, and after the expiration of the lease, the dean and chapter, on the pauper's application, and on *payment by him of a sum of two guineas*, granted a new lease of the premises in question at a new rent of 1s. to hold to the pauper, his heirs and assigns, for three lives, Lord Ellenborough, C. J. observed, that "there would be no difficulty in deciding that this was a purchase under 30l. within the statute." (2)

The act requires 30l. to be paid; the value of estate immaterial. Gives no settlement if made of more value by subsequent improvements. Otherwise where he improves, sells, and then repurchases.

2. The act makes the criterion of the settlement 30l. *bona fide* paid, without reference to the real value of the interest. "It takes the value of the purchase from the purchase-money actually paid." If, therefore, an estate is purchased for less than 30l., and the purchaser renders it of greater value by subsequent improvements, he does not acquire a settlement (3). But if the original consideration be less than 30l., and the purchaser improve the premises, and afterwards sell them, and then repurchase them for more than 30l., it will confer a settlement, and avoid a certificate. (4)

The pauper had a leasehold of 5l. *per annum* value, for the term of fifty years, for which he paid only sixpence reserved rent, and lived on it twenty-five years, and then

(1) Rex *v.* Warblington, 1 Term Rep. 241.

(2) Rex *v.* Martley, 5 East, 40. But see the case of a surrender of an old lease, and subsequent grant, Rex *v.* Tarrant, Launceston, Cald. 209. ante, 68. (1)

(3) Rex *v.* Dunchurch, Burr. S. C. 553. 1 Black Rep. 596—598. But Rex *v.* Benjoe, 2 Bott, 515. n. a. is contra.

(4) Rex *v.* Stansfield, Burr. S. C. 205. But the case is not precisely in point, because the lessor granted a fresh lease to the assignee, previous to his re-assignment to the original lessee. The circumstance, however, seems of little importance.

sold

sold the remainder of his term; it was considered as a clear case, that he was settled in the parish where his estate lay. (1)

But it is sufficient, if a consideration of 30l. is paid by the purchaser, without reference to the subsequent distribution of the purchase-money. A copyhold tenement, the price of which, with the fines and fees paid to the court, amounted to 30l., gives a settlement (2). And although the deed of conveyance express the consideration to be less than 30l., parol evidence is admissible to prove that more was actually paid. (3)

30l., including fees, was paid for a copyhold, and gave a settlement. Parol evidence received of the consideration.

3. The consideration of 30l. must be *bonâ fide* paid to the vendor; but if he receives so much, it is immaterial whether the purchaser pay it out of his own funds, or borrow it on credit (4), or whether the consideration is a debt due to him from the vendor (5), or though part of the money is given to him, if done without fraud (6), it is sufficient to satisfy the words of the statute.

Purchaser may borrow the money, &c.

J. S. mortgaged, to the pauper, for 15l. with interest, a leasehold interest, determinable on lives, which cost 40l. J. S. died intestate, not having paid the money, and owing thirty shillings interest thereupon. He was also indebted

A. mortgages a leasehold to B. for 15l., and dies intestate, ow-

(1) Rex v. St. Mary, Whitechapel, Burr. S. C. 55. But nothing more appears in the case than the pauper had a leasehold interest. The mode of acquiring it, whether by purchase, or operation of law, is not set out. It also appears, that the pauper was possessed of this lease prior to 9 Geo. I. c. 7.

(2) St. Paul's, Warden v. Kempton, Fol. 138.

(3) Rex v. Scammonden, 3 Term Rep. 374.

(4) Per Lord Kenyon, C. J. Rex v. Challey, 6 Term Rep. 755. post, 97. (2), cites Rex v. Tedford, post. 96.

(5) Rex v. Stockland, Burr. S. C. 169.

(6) St. Paul's, Walden v. Kempton, ante, (2). There 40l. were paid by the officers of the parish in which the purchaser was settled, but the sessions did not find it to be done fraudulently.

in B also 18l B t kes out adminis tration, and resides on the pre mises He gains a settlement, f r he has paid a consideration of more than 30l.

indebted to the pauper by bond and simple contract in 18l 10s. The pauper agreed with the widow, that if she would renounce administration, she should have her husband's goods; which were appraised at 20s. This being done accordingly, he took out letters of administration to S. as his principal creditor, and entered upon the premises, which were then appraised at 25l. He was afterwards offered 30l. for them, and dwelt there eight years. The court were unanimous, that he had gained a settlement. The consideration he has *bonâ fide* paid, exceeds the sum of 30l., and he remained upon the estate irremoveable forty days. (1)

G. purchases for 39l, pays 9l, and B pays remainder A month after G grants him a mortgage for the money, it is a purchase by G which gives a settlement.

G. contracted for a house and curtilage for 39l. which was conveyed to him, and his heirs, accordingly. G. paid only 9l. and one J. B. paid the remaining 30l. by G.'s order. *A month afterwards* G. mortgaged the premises to J. B. for a thousand years, under a proviso, to be void, on payment of the money in a year. G. continued in possession four years, when B. entered, by virtue of the mortgage, and a release of the equity of redemption. This is not a case within the act, so as to prevent G.'s settlement; "for a consideration of 39l. was *bonâ fide* paid to the vendor, and it would be pretty hard to say that the justices had a power upon this act to inquire, whether the purchaser borrowed the money, or not." (2)

A purchases a copyhold for 60l., mortgaged for 50l.; he borrows 50l. from B. to pay it off,

The pauper agreed to purchase of R. H. a copyhold messuage in Chailley, which R. H. had before mortgaged to C. to secure the sum of 50l. and to pay for the interest of R. H. therein 10l. In pursuance of this agreement, he paid R. H. 10l. who surrendered the premises, 4th November 1786, to him, subject to the conditional sur-

(1) Rex *v.* Stockland, Burr S. C. 169. The Justices at sessions had found it fraudulent. But the court of K. B. were clearly of a contrary opinion.

(2) Rex *v.* Tedford Burr S. C. 57.

render

render which had been made to C. to secure the 50l. In May 1790, the pauper borrowed 50l. of J. H. on the security of the copyhold, in order to pay off C., which he did accordingly, and the conditional surrender to C. was discharged the 8th of May. On the same day he made a conditional surrender to J. H. to secure the 50l., and on 4th November 1795, sold the estate for 80l. Lord Kenyon, C. J.—"I am not able to distinguish this case from Rex *v.* Tedford (1)." It has been argued, that this was only an assignment of the original mortgage from the first to the second mortgagee, and that the mortgage interest never was in the pauper; and to be sure, if that interest never was in the pauper, it would be difficult to say that it conferred a settlement upon him. Then it is said, that though the mortgage interest did pass through the pauper, it was merely the mode of transferring a copyhold interest from one person to another, and that this interest did not vest in the pauper. But the latter part of the proposition is not true; the estate did not pass immediately from the first to the second mortgagee; there was an interval, though a short one, in which the estate was vested in the pauper, and he conveyed it to the second mortgagee. An attempt, however, was made to distinguish this case from Rex *v.* Tedford, by saying that there the legal estate was in the pauper for a longer period than in the present case; but that cannot furnish any real ground of distinction. If this had been a freehold estate, every judgment signed against the pauper, and properly docketed, would have attached on this estate." (2)

and then surrenders the premises to secure the money lent by B., and afterwards sells the estate for 80l. The purchase is not within the act.

But, although it is immaterial whether the purchaser borrow the money or not, yet the sum of 30l. must not only be actually paid, but must also be *bonâ fide* paid by him.

The purchase money must be bona fide paid.

(1) Ante, 96. (2).

(2) Rex *v.* Chailley, 6 Term Rep. 755.

The

A. purchases for 39l. 17s. 6d. premises mortgaged to B. for 32l.; he pays 7l. 17s. 6d., and two years' interest to B., and in two years delivers up possession without paying the mortgage; this is a purchase for 7l. 17s. 6d.; otherwise if he had given B. a personal security, and afterwards mortgaged.

The pauper W. contracted with I. for the purchase of a copyhold tenement, which had been previously mortgaged to B. for 32l. with interest, and which was then unpaid. The contract was, that W. should pay thirty-nine pounds seventeen shillings and sixpence for the tenement, which was to include the thirty-two pounds due to the mortgagee. He paid seven pounds seventeen shillings and sixpence in pursuance of the contract, and was duly admitted to the premises on the surrender of I. subject to the mortgage surrender to B. He entered, and continued in possession four years, during which time he paid two years' interest to B. He then delivered up the possession to B. never having paid the mortgage money. The court were of opinion, that this was only a purchase for 7l. 17s. 6d. as he purchased only the interest of the mortgagor, subject to the mortgage. The estate being mortgaged for 32l. if the mortgagee got into possession, he might have gained a settlement upon it; if so, he was a purchaser for 32l., and the pauper only purchased, subject to the charge. If the pauper, previous to the contract for the purchase, had given the mortgagee a personal security for the mortgage money, then he would in fact have bought an estate for 30l., though part of the purchase money would have been borrowed on mortgage; then the words of the statute would have been satisfied, and the pauper would have gained a settlement. (1)

SECT. III.

Of the Residence.

Criterion of settlement.

No one can be removed from the place in which their freehold is situated within the first 40 days of residence.

(1) Per Ashhurst, J. Rex *v.* Mattingley, Grose, J. assent. 2 Term Rep. 12.

But

But if he quits it voluntarily, and becomes indigent, he cannot be removed thither unless he has resided 40 days. The mere circumstance of being irremovable from a place is not a conclusive criterion of a settlement there. In many situations beside that already stated persons cannot be removed, although they have not acquired settlements. The true criterion of settlement in any district maintaining its own poor is, whether the party be removable thither on the ground of requiring parochial relief.

This depends, in all cases of acquired settlements, that is, where residence is necessary, "upon the statute "of 13 & 14 Car. II. c. 12. which directs the sending "a pauper to the place where he was last legally settled "for the space of 40 days." (1)

In order therefore to acquire a settlement by estate, the party must reside 40 days in the parish in which his estate lies, and while his interest continues. 40 days' residence in the parish.

Residence for twenty-eight days has been held insufficient. (2) Residence 28 days insufficient.

But the days need not be continued; it is enough if he reside 40 in the whole. A pauper who was seised of an estate of freehold and inheritance, in common with Need not be 40 successive days.

(1) Per Lee, C. J. Rex *v.* St. Nyott's, Burr. S. C. 132. The statute 13 & 14 Car. II. c. 12. does not expressly mention residence as owner of an estate. This species of settlement must therefore either depend upon being an exception to the modes of acquiring settlements specified in the act, or upon applying the term "*Sojourner*" to persons lawfully inhabiting a parish and who cannot be removed from it.

(2) Rex *v.* West Shefford, Burr. S. C. 307. See also Wookey *v.* Hinton Blewet. An order removing a person to an estate which had descended to him, but where he had not resided, was quashed. 1 Str. 476. See ante, 53 et seq.

 his

his mother and sisters, and lodged sometimes on his own estate, and sometimes in other places in the parish off and on for three years, but never for the space of 40 days in the parish at any one time, thereby gained a settlement. (1)

Residence on the estate unnecessary.

And it makes no difference whether he reside on his own estate, or at another person's, or in an ale-house. (2)

But the residence must be while the estate continues vested in the person claiming a settlement. A pauper being entitled to administration of an intestate's effects, as one of his next of kin, resided for three years in a leasehold house which belonged to the intestate, but took out administration only eighteen days before her removal. Lord Ellenborough, C. J. in delivering the court's opinion, observed, that the pauper could not gain a settlement by taking out administration at that time. The grant of letters of administration may have the effect of vesting the leasehold property in the administratrix, by relation from the intestate's death, so as to enable her to bring actions for all matters affecting the intestate's property, and to make her liable to account for the rents and profits from that time, yet such relation cannot operate to the impossible extent of rendering her not removable at a time past, when, as far as the letters of administration were concerned, she was removable for the want of them. (3)

(1) Rex *v.* St. Nyott's, Burr. S. C. 132. Rex *v.* Sowton, Burr. S. C. 125.

(2) Supra, (1), and also Rex *v.* Dorstone, ante, 89. (2). Rex *v.* Horsley, infra, (3).

(3) Rex *v.* Horsley, 8 East, 410. In this case the pauper was entitled as sole next of kin, and gained a settlement. See ante, 86. (1). But the judgment as to this point went on the supposition that administration was necessary to entitle a sole next of kin to a settlement.

It appears from the foregoing decisions, that the inhabitancy required, depends upon the same principles which govern it in other kinds of settlement, and may perhaps be safely considered as regulated by such determinations as have taken place respecting them.

SECT. IV.

Of the Proofs necessary to establish a Settlement by Estate.

It is necessary to prove, 1st, That the party had either a legal or equitable interest in possession in lands or tenements, situate within the parish or town where it is sought to settle him; 2d, A residence of 40 days. Proofs.

1st, Proof of the party's title to an estate is one of the most important and extensive subjects of the law. The general rules for the admission of written and parol evidence have been already examined. But to set forth and arrange the various cases of title to which they are applicable, would be a task of much labour, and comparatively of small use to an essay like the present. 1. Proof of title.

It will be sufficient to remark, therefore, that the most usual method of deriving titles in cases likely to occur in questions of settlement, are, 1st, By descent, as heir to the person last seised of a freehold estate. 2d, By copy of court roll, when it is a copyhold. 3d, By marriage (1). 4th, By will. 5th, As executor. 6th, As administrator. 7th, By direct conveyance to the party for whom the settlement ts claimed (2). 8th, By long peaceable possession. Usual methods of deriving title in cases of settlement.

(1) Ante, 258. et seq. (2) Ante, 62.

Proof of title by descent.

1st, To establish by title a descent where the estate is a fee simple, it is necessary to prove, that the ancestor died seised of the premises, and that the claimant is the next heir according to the rules of succession, as by law established. What any of the family who are dead have been heard to say, or general reputation in the family, entries in family books, monumental inscriptions, recitals in deeds, bills filed in chancery by an ancestor, &c. are allowed to prove a descent. (1)

Hearsay evidence of pedigree.

Proof of death of those nearer in blood.

And as the party must not only prove himself related, but also the next in succession to the ancestor, if there has been some other person of nearer blood, he must be shewn to be dead, without issue. In such case, if the fact cannot be directly proved, it will be sufficient to shew that he has not been heard of for seven years, in order to put the opposite party on proof that he still exists or has issue. (2)

Proof in estate tail.

Where the estate is in tail, whether general or special, the claimant must be proved next heir according to the limitation described in the conveyance.

Title to copyhold, copy of court roll.

2d, A title to a copyhold estate is generally proved by producing the court-rolls. But, an examined copy, if sworn to be a true one, is equally admissible (3). If the party

(1) Bull. L. N. P. 233. Ib. 294. Taylor *v.* Cole, 7 Term Rep. 2.

(2) Rowe *v.* Hasland, 1 Black. Rep. 404. See also Rex *v.* Martley, 5 East, 40.; a person absent 30 years, and not since heard of by her relations, may be presumed dead. A minor apprenticed to the sea service went to sea, and had not afterwards been heard of. The court was of opinion, that according to 19 Car. II. which respect leases on lives, and also 1 Jac. I. c. 11. respecting bigamy, the presumption of the duration of life with respect to persons of whom no account can be given, ends at the expiration of 7 years from the time when they were last known to be living; and there is fair ground to presume their death at the expiration of that period, whenever the precise term of their death becomes material. Doe *v.* Jesson, 6 East, 80.

(3) Bull. L. N. P. 247.

party has not been admitted tenant, his relationship to the person who last died tenant of the premises must be proved. Here it will be necessary, not only to shew the claimant's relationship, but the ancestor's admission. If the lands go according to any local custom which differs from the rules of descent, as established by common law, that custom must be proved. Customs that the lands shall go to the youngest nephew (1), or the eldest daughter (2), or that they shall not be partible between heirs female, are of this kind (3). These customs may be proved, by producing an ancient customary of the manor, which has been handed down with the court-rolls (3), or some entry in the court-rolls defining the mode of descent in the manor (4), or by entries of persons claiming in that character having been admitted tenants (5). But such customs are to be construed strictly, and the common-law rules of descent shall prevail, where the customary mode is not fully established. Thus instances from the rolls of a manor, that the eldest daughter and eldest sister have succeeded to the copyhold, do not extend the custom to an eldest niece; but the lands shall go in preference to the male heir, according to the rules of the common law. (6)

Local customs which regulate descent.

How proved.

Customs taken strictly.

3d, If the title is under a will, and the party claims a freehold estate, not only the testator's death, but the will itself must be produced and proved. (7)

Proof of title by will to freeholds.

If the interest is only leasehold, nothing but the probate of the will or letters of administration, with the will

To leaseholds by probate.

(1) Doe v. Mason, 3 Wils. 63.

(2) Denn v. Spray, 1 Term Rep. 466. although no entry appeared in the rolls that any person took according to it.

(3) Denn v. Spray, ante, (2).

(4) Roe ex. dem. Beebee v. Parker, 5 Term Rep. 26.

(5) Doe v. Mason, ante, (1).

(6) Den ex. dem. Goodwin v. Spray, ante, (2).

(7) As to which, see ante, Vol. i. 531.

 annexed,

annexed, are legal evidence of the will, as in all questions respecting personalty (1).

Claim by executor to leasehold, quære, if proof of the will sufficient.

An executor, claiming a leasehold as such, should produce the probate of the will. But as a term for years vests in him without probate, *quære*, whether proof of the will, and entry upon the premises by the executor, would not be sufficient, as in cases of real property, especially supposing the party to have died without taking out probate (2).

4th, As administrator.

Proof of title by administration.

The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted, which is of course good evidence of that fact (3). So would the book of the ecclesiastical court, wherein was entered the order for granting administration (4), notwithstanding a subsequent grant of administration to another person, the first not being recalled. For the letters of administration are only a copy of the court's original minutes, drawn up in a more formal manner. (5)

(1) Per Lord Kenyon C. J. Rex *v.* Netherseal, 4 Term Rep. 258. ante, 34. (1). But that a copy of the probate is evidence, at least against the executor, see Smartle *v.* Williams, post, (2).

(2) See Rex *v.* Stone, 6 Term Rep. 295. But there the pauper proved the will three days previous to the removal, as to the effect of which see Rex *v.* Horsley, ante, 100. (3). It is laid down in Bull. L. N. P. 246. that a copy of the probate of the will is evidence of S. being executor; but a copy of the will would not be evidence. Cites Smartle *v.* Williams as cited by Hardwicke C.

(3) Garret *v.* Lister, 1 Lev. 25. Count of Manchester's case cited, ibid. and see Bull. L. N. P. 246. It is laid down in Lewis *v.* Brag, Bull. L. N. P. 108. that the book or copy of it cannot be given in evidence, unless it be proved that the administration under seal of the court is lost. But this determination seems overruled by the reasoning of the court in Elden *v.* Keddel, post. (5).

(4) Ib.

(5) Elden *v.* Keddel, 8 East, 187.

But

But the same strictness of proof is not required to ascertain a title to an estate in cases of settlement, as would be necessary in an action of ejectment (1), of which the object is to change the possession and affect the right. The difficulties are lessened by the admissibility of the pauper's own evidence; and in the case of third parties, such as contending parishes, peaceable possession is strong evidence of title, as it shews an acquiescence by those who are most interested to dispute the enjoyment, if the parties' right could admit of being questioned.

The strictness of proof required in ejectments unnecessary in cases of settlement.

(1) See the opinion of Lord Kenyon, C J. Rex v. Butterton, 4 Term Rep. 554. ante, 74 (2), and of Wilmot, C. J. Rex v Cold Ashton, ante, 72. (4).

CHAPTER XXV.

Of Settlement by Payment of Public Taxes of the Parish.

Division of subject.

THIS species of settlement depends upon 3 W. III. c. 11. s. 6. which enacts, that if any person who shall come to inhabit in any town or parish shall be charged, and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement.

The subject will be best explained by considering,

1. The kind of taxes or levies intended by the statute, and in respect of what they must be payable. 2. What constitutes a rating. 3. What amounts to a paying. 4. What is a sufficient inhabitancy.

1. Kind of taxes.

1. Of the kind of taxes, and in respect of what payable.

Parochial taxes.

In general a settlement may be gained, not only by payment of such taxes as are strictly parochial, such as the poor's rate (1), but also of any other public tax which is charged and payable within a parochial limit (2). Such are a church rate (3), the land tax (4), and other

(1) Openthaw *v.* Gorton, Burr. S. C. 522. and many other cases.

(2) Per Holt, C. J. Rex *v* Blood, Comb. 410.

(3) Rex *v.* St. Bees, 9 East, 203.

(4) Oakhampton *v.* Kenton, Burr. S. C. 5. Rex *v.* Chidingfold. Ib. 415.

of

of the king's taxes (1). But the party must pay in the quality of a parishioner. Payment towards a county bridge therefore, gives no settlement, for the person pays as an inhabitant of the county, and not of the parish or town where he lives (2). Also the statute does not require that the payment should be for an entire year; if one who is rated pays his share for a less time, as for a quarter of a year, it is sufficient. (3)

Payment of the following taxes confers no settlement, in consequence of express provisions made by statute:— Taxes excepted by statute.

The scavengers' rate and assessments for the repairs of the highway, by 9 Geo. I. c. 7. s. 6.; duties on houses worth 5l. yearly rent and upwards, by 18 Geo. III. c. 26.; duties on houses and windows, by 21 Geo. II. c. 10.; or any of the assessed taxes, by 43 Geo. III. c. 161. s. 59.

Prior to 35 Geo. III. c. 101. the account on which a tax became payable was of no importance in a question of settlement. A person rated to the land tax (4) for his salary (5), or a tenant assessed to the poor's rate for a tenement, however small in value, might acquire a settlement. (6)

But it was thereby enacted, "that *from and after* the passing of this act, no person or persons whatsoever, *who shall come into any parish, township, or place,* shall gain a settlement in such parish, &c. by being charged 35 G. III. c. 101.

(1) Anon. Comb. 282.

(2) Cases of Sett. 1.

(3) Rex *v.* Bramley, Burr. S. C. 75.

(4) Rex *v.* Chidingfold, Burr S. C. 415. and see Rex *v.* Axmouth, 8 East, 383.

(5) Rex *v.* Oakhampton, Burr. S. C. 5.

(6) St. Mary Le Moor *v.* Heavytree, 2 Salk. 478. although a purchase for less than 30l. Rex *v.* Worth, Burr. S. C. 90.

with,

with, and paying his or their share towards the public taxes or levies of the said parish, &c. for and in respect of any tenement not being of the yearly value of 10l."

As most parochial taxes are payable by reason of the occupation of a tenement situated within the parish, this statute has confined the acquisition of settlements, by rating, within narrow bounds; because where a tenement is of the yearly value of 10l. an assessment is immaterial, since the occupation confers a settlement on the tenant, whether he is rated or not.

To whom it extends.

In construing this statute, some doubt was made whether it extended to persons dwelling in the parish at the time it passed, the words seeming to relate only to those "who, after the passing of the act," shall come into any parish, &c. But the court were clearly of opinion, that the legislature meant that its operation should be general; and that no person, after the passing of the act, should gain a settlement by being rated and paying, &c. whether he became an inhabitant after the act passed, or resided there at the time. (1)

SECT. II.

Of the Rating.

Rating necessary.

It is necessary that the person claiming a settlement should be actually rated. An inhabitant who contributes to support the poor of a parish or vill where no rate is made,

(1) The words "who shall come into any parish" mean, who shall inhabit there. Per Lord Kenyon, C. J. Rex *v.* Islington, 1 East, 483. Rex *v.* Alverthorpe, ib. n. b.

made, cannot acquire a settlement (1) by these means. So if a person who ought to have been rated, pay a rate, without being assessed, in fact, he gains no settlement. A father who had a small estate, agreed that his son should hold it for a year, and maintain the father instead of paying rent. Both lived on the premises for a year, and the son, who paid the tax, was not rated in his own name, but in his father's name. He gained no settlement: for in order to do so he must be both rated and pay (2); and it makes no difference that payment is demanded by the overseers of the parish, from the occupier, whose name is omitted. (3)

But though the rate be in form, or, in the manner of making it, not strictly legal, but void, yet if the party be rated and pay to such rate, he shall gain a settlement. For it would be hard, when there is in effect a rating by the consent of the whole parish, that one of the parish should come and say that it was a void rate, being their own making, and acquiesced under, and the money paid accordingly (4). So where a church rate was made upon householders only, instead of the parishioners at large, a party who was rated, and paid under it, obtained a settlement. For it was a public tax, charged and paid within the parish, and not less so from being laid too narrowly (5). But the party's name must be included in the rate before he pays it, for if it be inserted afterwards he does not acquire a settlement. (6) Where rate void.

As to what shall be a sufficient description of the person in the rate, to amount to a rating; it is unnecessary Person, description in the rate.

(1) Rex *v.* Friendsbury, Burr. S. C. 644.

(2) Rex *v.* Lower Walton, Burr. S. C. 100. See also Rex *v.* Bramshaw, ib. 98.

(3) Rex *v.* Sarratt, ib. 73.

(4) St. Giles, Cripplegate, and St. Mary, Newington, 19 Vin. Abr. 386. Rex *v.* Lancaster, ib. 384.

(5) Rex *v.* St. Bees, 9 East, 203.

(6) Rex *v.* Edgbaston, 6 Term Rep. 540. See also Rex *v.* St. Olave's, post. 111. (2).

that

that the occupier be expressly named in the rate, if he be otherwise sufficiently described therein, so as to shew that the parish knows that he is an inhabitant. (1)

A person lived at a place called Roscoe's Tenement, and paid taxes in that parish by the name of "the occupier of Roscoe's (2)." One Hind purchased a tenement for 12l., and was rated to the land tax for it as "occupier of the late widow Hooper's, now John Hind's tenement (3);" and to the poor's rate, "occupier of late James Hooper's, now Hind's;" these were sufficient descriptions of the tenant in the rate. Also a rating, "Thomas Clifford or tenant," was held a sufficient rating of a succeeding tenant. (4)

Whether rated a question of fact.

The question whether a man be rated or not, depends upon the fact, whether it appears sufficiently from circumstances, that the parish officers have taken notice of him as an inhabitant (5). The insertion of the name of the premises therefore is a sufficient description of the tenant, if he be called upon and pay the rate. Thus, "late Lowbridge's house (6)," or "Bowden's (7), is well enough: also a rate on "the widow Preston," she being known to be dead, was held a good rate upon her son, who occupied the premises and paid the rates. (8)

Person not rated.

The name of a pauper that was residing under a certificate was inserted in a church rate, and no sum set

(1) See Rex *v.* Painsworth, Burr. S. C. 465.

(2) Rex *v.* Brickhill, 8. Mod. 38.

(3) Rex *v.* Uffculme, Burr. S. C. 430.

(4) Rex *v.* Painswick, Burr. S. C. 465. See Rex *v.* Llangammarch, post. 113. (1).

(5) Per Aston, J. Rex *v.* Walsall, Cald. 37.

(6) Rex *v.* Walsall, Cald. 35.

(7) Rex *v.* Openshaw, Burr. S. C. 522.

(8) Rex *v.* Heckmondwicke, Cald. 103. But King's Fair *v.* King's Swinford, Salk. 523. 2 Bott, 3 Edit. 228. contra.

against

against his name, but marked "to bring security," and the total of the rate was cast up without any charge upon him. The next year the churchwarden being told by the pauper that he had got a certificate, demanded the rate, being 1s. 6d. from him, when the pauper, having paid, the overseer figured the sum of 1s. 6d. in the rate (1). This was held not to be an informal or irregular rate, but no rate. The alteration by inserting the sum was not made until the following year, by the churchwarden of the following year, without any authority from the parish, or consideration had by them concerning the ability of the person rated. (2)

Sum need not be specified.

But the occupier is to be considered as assessed to the poor's rate when his name is inserted, if the amount of his assessment can be collected from other parts of the rate. Thus, where the rate professed to be at 2s. in the pound, and the tenant's rent was inserted in the rate, it was held a good assessment, for his proportion was thereby ascertained. If therefore the rate be received from him under such circumstances, he acquires a settlement. (3)

Where names of landlord and tenant in the rate,

It frequently happens that both the names of the landlord and occupier appear on the rate. In this case, if it be stated in the rate itself that the landlord is the person rated, as by inserting at the head of the column in which his name stands, "landlords rated," the tenant cannot be considered as the person assessed, although he pay the rate (4). But if neither be assessed in terms by the rate,

(1) See Rex v. Edgbaston, ante, 109. (6).

(2) Rex. v. St. Olave's, Burr. S. C. 787.

(3) Rex. v. Corhampton, Doug. 621. Cald. 108. in which case the parish officers appeared to have entertained doubts as to rating him, having prefixed to his name "Quæry certificate."

(4) Rex v. Carshalton, Burr. S. C. 809. Rex v. St. John's Southwark, Cald. 62.

the

Land tax, &c.

the question, who is rated? is one of fact, and must be collected from other evidence. (1)

The poor rate is clearly an occupier's tax, and so is also the land tax, as between the tenant and the public, for all the remedies are against him. If therefore the names of both landlord and tenant are inserted in the land tax rate, the law will presume that it was intended that the tenant should be rated, where the rate itself is silent as to this particular, and there is no collateral evidence to supply the defect. For it is the tenant who ought to be charged, as being the person against whom the officer of government takes his remedy in the first instance, although the landlord is directed by the act to allow the sum levied out of the rent (2). Where, therefore, the names of landlord and tenant were inserted in the rate, without declaring on which the assessment was imposed, the tenant was held to be rated, although it appeared in evidence that the landlord had been formerly rated, and that the tenant, after paying the rate four years, had his name taken off at his own request, by reason of his poverty. (3)

But this presumption may be rebutted by collateral circumstances. The name of both landlord and tenant appeared on the land tax rate (4), but the receipt given to the tenant was for "so much assessed on the landlord," it was held that this receipt related back to the time of the rate, and that the landlord was the person rated (5). The name of the farm Waynllwyd was inserted in the poor rate, without referenee to the landlord or tenant.

(1) Per Buller, J. Rex *v.* St. Lawrence, Winchester, Cald. 385. Rex *v.* Endon, ib. 374.

(2) Rex *v.* Mitcham, Cald. 276. where the court were of opinion that the occupier was rated on the further ground, that the rate professed in the title to be made on the inhabitants. Rex *v.* St. Lawrence Winchester, Cald. 379.

(3) Rex *v.* Endon, Cald. 173.

(4) This rate contained a column, entitled, "*what assessed* and where situated," under which and opposite to the pauper's name was inserted "*tenant.*" Buller, J. held the receipt to be strong evidence, that the tenant paid the rats as agent to the landlord.

(5) Rex *v.* St. James's, Bury St. Edmund's, Cald. 385.

The

The landlord paid the taxes by the tenant's desire, who allowed them to him again. But it appeared that the overseers of the poor, who received the tax from the landlord, knew nothing of the pauper, nor whether he resided at the farm at the time. It was held that he was not rated so as to acquire a settlement. For rating the house is not sufficient, when the presumption that the parish could not but know who was the occupier is negatived by express proof of the fact. (1)

SECT. III.

Of the Payment.

Person rated must pay

It is necessary that the person rated should pay the tax, or he cannot acquire a settlement (2). But he will gain one by being rated and paying, although he is wrongfully assessed for premises which another occupied; for these facts amount to a public recognition by the parish of the man's inhabitancy among them. The pauper went to live with his mother, as part of her family, at S. where she had a house and small parcel of land *which she occupied herself.* Whilst he lived with his mother he was included in a house and church rate for the parish of S. being charged as occupier of the land belonging to his mother. He paid such assessments, although he did not, during any part of the year, occupy the whole or any part of that land, or any other house or land in that parish. The Court were very clear that he gained a settlement. (3)

Although repaid.

Where payment of the rate is made by the tenant rated, it may confer a settlement notwithstanding he is

(1) Rex *v.* Llangammarch, 2 Term Rep. 625. See Rex *v.* Painswick, ante, 110. (4).

(2) See Rex *v.* St. Nicholas Abingdon, Skin. 620. Telburn *v.* Boston, 2 Salk. 523.

(3) Rex *v.* Stapleton, Burr S. C. 649.

afterwards repaid by another person. Thus it has been held sufficient if the tenant actually pay the land tax of his premises, although it was afterwards allowed by the landlord; for the parish has nothing to do with their private agreements (1). A tenant was duly rated to the poor tax, but his landlord was under agreement to pay all taxes for him but the poor tax. The landlord directed the overseer to call upon the tenant for a quarter's tax, and to tell him that his landlord ordered him to pay it, and would allow it out of his rent. The tenant accordingly paid, and notwithstanding he was afterwards repaid by the landlord, he gained a settlement (2). So also a custom-house officer, who is rated to the land tax, and pays it, will acquire a settlement, although the amount is either actually given him before hand, or allowed him afterwards by the collector of the customs. (3)

Payment on tenants' accounts.

And it is enough if the money be in fact paid by him, through the intervention of an agent. The tenant of certain premises, for which he was duly rated to the land-tax, absconded; whereupon the landlord desired the collector to distrain on the tenant's goods, "otherwise he should lose the money." The collector went to the house for that purpose, but a friend of the tenant's paid the tax, in consequence of an application from his daughter. The Court were clearly of opinion that this was money raised for the tenant's use, for which an action might be maintained against him. The money was advanced by a friend, in order to protect him from a distress, under which his goods would otherwise immediately have been taken. (4)

(1) Rex *v.* Bramley, Burr. S.C. 75. Rex *v.* Chidingfold, ib. 415. Rex *v.* Fulham, ib. 488.

(2) Rex *v.* Openshaw, Burr. S.C. 522.

(3) Rex *v.* Oakhampton, Burr. S.C. 15. Rex *v.* Axmouth, 8 East. 383. S.P.

(4) Rex *v.* Bridgewater, 8 Term Rep. 550.

I 1 But

But it is necessary that the rate should be either paid in fact by the tenant himself, or at least constructively by the hands of his agent. An exciseman was rated to the land tax for his salary, but never paid the rate, it being *paid by the collector* of excise, and not deducted out of the pauper's salary. He gained no settlement, for he neither paid mediately nor immediately (1). It is sufficient likewise if the money be paid *bona fide* by the pauper, although it may have been received by the overseer through a mistake, and is afterwards returned by him. (2)

Tenant must pay in fact.

SECT. IV.

Of the Inhabitancy.

It is equally necessary that the person claiming a settlement shall be an inhabitant of the parish, as that he should be rated and pay. If he reside in one parish, and is rated in another, he gains no settlement in either, under the provision of 3 W. and M. c. 11. s. 6.; for that statute says, that any person who *shall inhabit* in any town or parish, and be charged with and pay his share towards the public taxes of the said town or parish, shall thereby obtain a settlement (3). It seems also that he must be an inhabitant for the space of 40 days. For the rating is substituted for public notice (4), in which last case, as well as in all other kinds of settling, a residence of 40 days is required, by 13 & 14 Car. II. c. 12. (5)

Party must inhabit.

(1) Rex *v.* Weobley, 2 East, 68.

(2) Rex *v.* Corhampton, Doug. 621. Cald. 108.

(3) Rex *v.* St. Michael's at Thorn, 6 Term Rep. 586.

(4) Per Lawrence, J. ib.

(5) See Rex *v.* St. Nicholas, Abingdon, Skin. 620.

SECT. V.

Of the Proofs.

It is necessary, in order to establish a settlement by these means, to prove, 1. The rating. 2. The payment. 3. The inhabitancy.

No difficulty can arise in establishing any of these particulars, except the rating, as they may be proved by the pauper, or other parol testimony.

The best evidence to prove the rating, is the rate itself. Notice must be served therefore upon the parish officers to produce it at the hearing of the appeal. Parol testimony is inadmissible to prove the pauper's assessment (1), without proving such a notice, or giving some evidence that the rate is lost or destroyed.

(1) Rex *v.* Coppul, 2 East, 25. and see ante, vol. i. 540. Yet see Rex *v.* Issey, Burr. S. C. 826. which seems contra.

CHAPTER XXVI.

Of Settlement by Acknowledgment of the Parish.

THE several kinds of settlements, explained in the preceding chapters, are acquired by act of the party. But a parish or town, having the management of its own poor, may confer one, by acknowledging that a particular person has acquired a settlement there, which, in most cases, estops them from afterwards controverting the fact, either as to the party himself, or those who claim settlements through him. (1) Settlement by acknowledgment.

But this acknowledgment must, to affect the parish, be made by certain prescribed modes; for the parish officers have no power to settle a person in their parish by other acts or declarations (2). No person gains a settlement in a parish by having acted as a parishioner, and been treated as such in every other respect, beside being rated or receiving parish relief. J. C. kept a public house in the parish of A. for 36 years (3). He served as a juror upon court leets within it, and was appointed to work towards the repair of the highways, and kept watch and ward there. Sometime after he came, he was seated in the church by the churchwardens as a parishioner; and during his residence, the churchwardens and overseers distributed to him, among other parishioners, certain yearly gifts and charities which were to be given annually to the

(1) As to how far it is conclusive, see post.

(2) See the opinion of Lord Mansfield, C. J. Rex *v.* Weston St. Lawrence, Burr. S. C. 584.

(3) The value did not appear.

 parishioners

parishioners and inhabitants of A. only. He was held not to be settled in A. (1)

A parish may acknowledge a pauper to be settled with them in three ways. 1st, By relief. 2d, By certificate. 3d, By neglecting to appeal against an order of removal.

SECT. II.

Of acknowledging a Settlement by Relief.

Mere relief no evidence of settlement.

The bare fact of a pauper's having been relieved in a particular instance, is no proof of his being settled where he was relieved. He might be relieved as casual poor; and if in want of relief while in the parish, the parish officers were bound to give it, whether settled there or elsewhere. (2)

The pauper, who was a widow, proved, that a considerable time after their marriage, her late husband went to live in Chatham parish, away from his wife (3), and exercised the trade of a cordwainer there. She did not

(1) Rex *v.* Abbots Langley, 2 Bott, 3 Edit. 125. Pl. 163. Fitzg. 49. Bar K. B. 285. But Foley, 110. reports the decision contra. The question made in the case was, whether being treated as a parishioner amounted to constructive notice so as to entitle a pauper to a settlement by residence under 1 Jac. I. c. 17. and as J. G. was alive and examined, these facts could not be considered as direct evidence of his having gained a settlement by any other means, to prove which, he was not directly examined.

(2) Per Lord Kenyon, C. J. Rex *v.* Chadderton, 2 East, 27. The relief was applied for and obtained when the pauper buried his wife.

(3) She resided in the same parish. See 8 East, 499. n. (a).

know

know whether he acquired a settlement in C. or elsewhere, but knew that he received relief from C. more than once, being at one time a fortnight, and at another for a longer period, in the parish workhouse, from illness; that he died in the workhouse, and was buried at the parish expence; but that, during all the time he was so relieved, he resided in Chatham. The Court of K. B. were of opinion, that this was not sufficient evidence to prove the husband settled in C.

Lord Ellenborough, C. J. "On subjects of this sort it is important that there should be one uniform rule, as far as is consistent with law; and the rule having been laid down by Lord Kenyon, in the King *v.* Chadderton, that the bare fact of giving relief to a pauper within the parish was no evidence of his settlement there, because it might be given to him as casual poor, it is proper to abide by it. In that case indeed the relief was only administered once; and it seems necessary to consider, whether its having been administered more than once, or several times, alters the case, and differs this in substance from the other; for each instance in itself might not be evidence of the settlement, and yet it might be difficult to say that several instances might not furnish the conclusion. At the same time, however, it is to be observed, that though the relief were given for any length of time, the inference may be, either that the party receiving it was a settled inhabitant, or that his settlement could not be known. But that would bring it to an alternative case, on which the sessions might draw their own conclusion, and the difficulty would still exist. Upon the whole, therefore, it appears to me as the better rule to adopt, that it does not amount to evidence of the settlement, and there would be great impolicy in admitting it to have any weight; for if the parish officers, by giving relief to a pauper, were to be making evidence against themselves, as to his settlement

in their parish, it would make them perform their duty to casual poor with great reluctance; and therefore it is more consonant to humanity and policy, and to the rule of law laid down by Lord Kenyon, to say at once that it is no evidence of the settlement, than to leave it as a matter of inference in each case." The order of removal founded upon this evidence, and an order of sessions confirming it, were therefore quashed. (1)

Otherwise where given not as casual poor.

But where a parish relieves under circumstances which exclude the supposition of its being given to the party as casual poor, it is evidence that he is settled there.

Relief in a foreign parish.

The pauper's husband, thirty-eight years old, was born and always lived in A., but W. a township maintaining its own poor, had at various times, during forty years past, relieved the father of the pauper, and different members of his family, *while they resided in another township*, by taking some into the workhouse, relieving some in other ways, providing coffins, and defraying the expence of the funerals of others. This was held sufficient evidence of the pauper's husband's father being settled in A. For *per* Lord Ellenborough, C. J. " the relief was given by the township of W. to the father of the pauper's husband, and to the different members of his family; and this, while they were residing in another township. This was evidence of the father of the pauper's husband's settlement in W. at that time; and this is stated to have been done at different times during the last forty years; the particular periods are not material; for no other settlement has been established since. And all things are presumed to continue in the same state, unless something be shewn to the contrary. Then, the only evidence set up against this is, that of the birth of the pauper's husband in A., which is no more than *prima facie* evi-

(1) Rex *v.* Chatham, 8 East, 498.

dence of settlement there." And, as contrasted with the evidence on the other side, is the weakest evidence of settlement. (1)

The pauper's grandfather came into S. with a certificate from O. in 1727. On appeal against a removal to S. no evidence was given of the pauper, his father, or grandfather having gained a settlement in any other place since the date of the certificate, but it was proved that the pauper and his family had been relieved by S. when residing in the several townships of L. and W. The court were of opinion that there was nothing to rebut the presumption of a settlement in S. from the repeated acts of relief, while the pauper and his family were residing out of the township, and there was no reason why S. should have relieved the pauper while residing in other parishes, if the officers had not known that he was settled with them. (2)

Relief only prima facie evidence of settlement.

It appears from these cases, that relief is only *prima facie* evidence of settlement; as it amounts to no more than shewing the opinion of the parish that the pauper was settled with them; (3) the parish may rebut it therefore, by proving that the person so relieved was settled at that time in some other place.

An estate in M. was conveyed to the pauper by his father, in consideration of natural love and affection, and 10l., and he resided upon it. He afterwards received a certificate from U. and was occasionally relieved by that parish during his residence at M. This certificate was considered as conclusive upon U. as to his settlement

(1) Rex *v*. Wakefield, 5 East, 335. and see ante, vol. i. 286.

(2) Rex *v*. Stanley cum Wrenthorpe, 15 East, 350.

(3) Per Lord Ellenborough, C. J. Rex *v*. Maidstone, 12 East, 553.

ment only up to the period when it was granted; and it was not even made a point, that the subsequent relief carried it further down, so as to defeat the settlement which the pauper would otherwise acquire by residence on his estate at M. (1)

SECT. III.

Of acknowledging a Settlement by Certificate.

Effect of certificate.

THE operation of a certificate, in protecting parties from being removed, will be shewn in another place. The object at present, is to consider its effect upon the settlement of those persons to whom it refers.

" A certificate is a most solemn acknowledgment by the parish who gave it, that the parties who are the subject of it are their legally settled inhabitants; it is a sort of adjudication that they are so; and when the persons certificated, or their children, become actually chargeable, the parish, who gave the certificate, is bound to receive them. (2)

It concludes the parish which gave it from controverting any fact which is there set forth, *as against the parish to whom it is given.* (3)

1. As to parties' marriage.

The parish cannot therefore dispute the marriage of persons whom it has thereby acknowledged to be man and

(1) Rex *v.* Ufton, 3 Term Rep. 251. post. 124. (2).

(2) Per Lee C. J. Rex *v.* Headcorn, Burr. S. C. 253.

(3) All Saints *v.* St. Giles, 2 Salk. 530. Rex *v.* Lubbenham, 4 Term Rep. 281.

wife.

wife (1). They admit it legal in all its consequences, and are bound to maintain the subsequent issue of the parties, as if one had really taken place. (2)

It may also bind a parish to admit the legitimacy of a spurious child, born previously; and although the certificate is obtained by the desire of that parish where the party was then resident, and where the child was born, it is equally conclusive, provided the latter is not guilty of fraud, and has not misled the parish, granting it by false information respecting the child's legitimacy. (3)

2. Legitimacy of a bastard.

If no fraud.

A certificate also granted, previous to the woman's delivery, will, if properly expressed, bind a parish to receive, and provide for, a child which is afterwards born illegitimate in the parish to which the undertaking is given (4); and by such acknowledgment, that he is an inhabitant, his family may derive settlements through him in the same manner, as that of any other person lawfully settled in the parish. (5)

Certificate previous to the bastard's birth.

A certificate is only conclusive of the facts it sets forth, and their legal consequences. If it acknowledge A. and B. as man and wife, the parish is bound to receive and provide for all the subsequent issue of A. and B., as their lawful children, until they have acquired

(1) Rex *v* Headcorn, supra, (1), and ante, vol. i. 270.

(2) New Windsor *v.* White Waltham, 1 Str. 186.

(3) Rex *v.* Tostock, Burr. S. C. 737. Though the justices should not have found fraud; yet, if the pauper, to whom the certificate was granted, desired the son to be included in it, the court would have understood it to be fraud. Per Lord Mansfield, ibid. Yet see Rex *v.* Lubbenham, post. 124. (2.)

(4) Rex *v.* Ipsley, Burr. S. C. 650. and ante, vol. i. 288.

(5) Ib.

some

some other settlement (1). But they must be proved their issue.

Conclusive up to what time.

And it is conclusive only up to the period when granted. A pauper having gained a settlement by residence on his estate at M., afterward received a certificate from U., and was occasionally relieved by U. while he continued to reside at M. It was held beyond all doubt, that though the certificate was conclusive at the time it was granted, it was afterwards done away by the pauper's residence on his own property (2); and the law is the same where one takes a tenement of the value of 10l. a-year in a parish, and is afterwards certificated there, he gains a settlement, notwithstanding the certificate, provided he reside there afterwards forty days. (3)

Conclusive, how far.

It is reasonable, that a certificate which operates as a kind of estoppel, should protect the parish which acts immediately upon the faith of it, so far as not to permit the certifying parish to dispute or falsify such facts as it contains. But, as an estoppel, it is not to be favoured, because its tendency is to prevent the investigation of truth; it is therefore conclusive evidence only, as between the parishes by whom it is granted, and that to whom it is given. It is indeed strong evidence against the certifying parish, in its dispute with any other place (4), but it is not so conclusive but they may disprove the facts alleged, if in possession of sufficient testimony to do so.

(1) See New Windsor *v.* White Waltham, ante, 123. (2).

(2) Rex *v.* Ufton, 3 Term Rep. 251. ante, 122. (1).

(3) Rex *v.* Findern, Cald. 426. The pauper had only resided a month in M. when he obtained a certificate from U. and see Rex *v.* Leek Wooton, 16 East, 118.

(4) Per Holt, C. J. All Saints *v.* St. Giles, 2 Salk. 530. Per Buller, J. Rex *v.* Lubbenham, 4 Term Rep. 251. But Honiton *v.* St. Mary Axe, 2 Salk. 535. is contra.

Thus,

Thus, if A. give a certificate to B. acknowledging the pauper as their parishioner, they are bound to receive and maintain him as settled with them, whenever he becomes chargeable to B.; but, if B. remove him back to A. and A. find that he is actually settled in C., A. may send him thither (1). So, where a woman believing her husband, then abroad, to be dead, contracted a marriage *de facto* with P. who was settled at L. The first husband returned, after which the woman and P. obtain a certificate from L. to T. acknowledging them to be legally settled there, the wife not being described by name, L. cannot dispute the fact as against T. but as against any other parish, L. is not precluded from inquiring into the truth of the case, and shewing that the woman's settlement is with her first husband. (2)

A certificate, though not delivered to the parish into which the pauper comes to inhabit under it, is an acknowledgment by the parish granting it, that the pauper was settled with them when it was given; yet it does not prevent the pauper from gaining a settlement in the certificated parish after it was granted; but according to one case, it is conclusive evidence of the settlement, up to the time when it was granted. (3) Certificate undelivered.

(1) All Saints *v.* St. Giles. ante, 124. (4).

(2) Rex *v.* Lubbenham, ante, 124. (4).

(3) Rex *v.* Buckingham, Cald. 64. That it is prima facie evidence between the parish granting the certificate, and that to which it is directed, seems very clear; for it is an acknowledgment by the former that the pauper is settled with them. But as the latter is not thereby prevented from removing the pauper, it seems hard that the certifying parish should be concluded by it in the same manner as if the parish to which it certifies had been compelled to receive him on the faith of the certificate. See the opinion of Wright, J. Rex *v.* St. Nicholas, Harwich, Burr. S. C. 171. and the distinction taken by Lord Kenyon, C. J. Rex v. Wensley, 5 Term Rep. 154.

SECT.

SECT. IV.

Of acknowledging a Settlement by not appealing from an Order of Removal.

Effects of acknowledgments.

THE effect of an acknowledgment by acquiescence under an order of removal, is more extensive than those already mentioned. An acknowledgment, by relief, is no more than *prima facie* evidence of settlement in all cases. If by certificate, it is conclusive against the parish which grants it, in questions between it and the parish to which it is delivered. But an order of removal, executed and unappealed from, is conclusive on the parish upon which the order is made, against all the world (1). It is so where the paupers reside under a certificate. A. obtained a certificate from E. to B. A son of his, born under this certificate, went with his wife and family to reside in M. who removed them by an order back again to B. This order, not having been appealed from, is conclusive that the husband is settled in B. even as between that parish and E. from which it received the certificate. (2)

Order of removal, where parties resided under a certificate.

Order removing as husband and wife.

Under such circumstances, therefore, an order removing two persons as man and wife, is final and conclusive of that fact, and settles them as such in the parish to

(1) Rex v. Chalbury and Chipping Farringdon, 2 Salk. 488. Per Buller J. Rex v. Kennelworth, 2 Term Rep. 598. Rex v. Corsham, 11 East, 388. and see Rex v. King's Norton, 2 Salk. 401. Rex v. Fillongley, 2 Term Rep. 709. Per Lord Kenyon, C. J. Rex v. Chilverscotton, 8 Term Rep. 178.

(2) Rex v. Ealing, Cald. 472.

which

which they are removed (1). It is equally conclusive of a marriage where the woman is removed as married, without her supposed husband (2). From hence it follows, that it is conclusive of the derivative settlement of after-born children; for their settlement muſt depend upon the validity of their parents' marriage, and cannot be controverted without controverting the marriage, which has been already admitted. (3)

And if the woman be described in the order as the wife of A. it is conclusive of *the husband's* settlement (4), although it has not given her the addition of wife, provided she is called in it by her supposed husband's name (5). Likewise if she is removed as E. S. widow, it is equally conclusive that *her husband*, if living, is settled in the parish. Because the order conveys a notice on the face of it, that the husband's settlement might come in question under it; for being removed as a widow the presumption is, that she was removed to the place where her husband was settled. (6)

As wife conclusive of husband's settlement.

So of widow.

But an order unappealed from is only conclusive of the settlement of persons mentioned in it, and their families. A man and his wife were removed from H. to N.; they had a son at the time of the removal, who lived in a dwelling house in N. which he rented separate and independent of his father, and he was not removed by, nor mentioned in the order, nor was he *then any part of his father's family*. *Per Curiam*, The order of removal unappealed from is concluſive as to the father and mo-

Concludes only as to persons mentioned.

(1) Rex *v.* Silchester, Burr. S. C. 551. ante vol. i. 270. Rex *v.* Binegar, S. P. Ibid. & 7 East, 377.

(2) Ante, vol. i. 270.

(3) Rex *v.* Wodchester, Burr. S C. 191. Rex *v.* St. Mary, Lambeth, 6 Term Rep. 615.

(4) Rex *v.* Hinxworth, Cald. 42. Rex *v.* Leigh, Doug. 45. Cald. 59 Rex *v.* Ealing, ante, 126. (2).

(5) Rex *v.* Towcester, Cald. 497.

(6) Rex *v.* Rudgley, 8 Term Rep. 620. ante, vol. i. 271. (2)

ther,

ther, but not as to the son, because he is not mentioned in it, and the sessions have expressly found that he was settled at H. (1)

To be conclusive must be prosecuted.

An order, to be conclusive, must be *bona fide* obtained and prosecuted.

An order abandoned concludes nothing.

If a parish obtain an order of removal, and then abandon it, consenting to take the pauper back, without giving the parish to whom it is directed the trouble of appealing, it concludes nothing. A party may give up a judgment intended for his own benefit. (2)

To be conclusive it must not be ex facie null.

But to be thus final and conclusive, it must not be *ex facie* null. It must appear on the face of the order, therefore, to be made by two justices having a competent jurisdiction (3). Yet, it seems, that it is not permitted to the parish, against whom it operates, to shew it void by circumstances, *dehors* the instrument itself, for they must, in such a case, appeal in the regular course of proceedings, or they are concluded by it. An order of removal from A. to S. was executed, and not appealed from. S. discovering that the paupers were settled in C. removed them thither. C. appealed, and relied upon the original order, unappealed from, as conclusive of the settlement in S. To repel which, S. proved, that this order, and the examination on which it was founded, were signed and taken by the two justices separately; and that one of them, although a magistrate for the county in which the order was made, took the examination, and signed the order at his own house, situate in another county. The Court, after taking time to consider, were of opinion, that this order was only voidable and not absolutely void, and

(1) Rex *v.* Southowarm, 1 Term Rep. 353. 658. Rex *v.* Diddlebury, 12 East, 359. S. P.

(2) Rex *v.* Llanrhydd, Burr. S. C.

(3) Rex *v.* Chilverscoton, 8 Term Rep. 178. ante, 126. (1).

three-

therefore as the parish of S. had not appealed against it, they were concluded by it. (1)

It must also be made to a place to which a removal can be made, and which has officers who may watch over its interests, and appeal against such orders as affect them without due foundation. An order of removal directed to A. which is only a large village maintaining its poor in common with the rest of the parish, is a nullity, and cannot become the subject of appeal so as to conclude any thing. (2)

And to a place having overseers.

But if it be directed to the parish at large, and served on a township within it which maintains its own poor, that is sufficient.

If directed to a parish at large, and served on township, sufficient.

The parish of Kirkby Stephen consists of ten different townships, maintaining their own poor separately; one of them is also called the township of Kirkby Stephen. An order was made for removing a pauper from N. to the parish of Kirkby Stephen. It was directed to the church-wardens, &c. of the parish of Kirkby Stephen, and the pauper's settlement was adjudged to be in that parish; but the order was delivered with the pauper to the township of Kirkby Stephen, which did not appeal. In a question concerning the pauper's settlement upon a removal from the township of Kirkby Stephen to that of Whatton, in the same parish, Lord Mansfield—" This case resembles very much that in Viner, of Rex *v.* Stepney (3). The township of the parish which is named in the order, and to which the pauper is brought, ought to appeal. The justices are not obliged, nor perhaps is it in their power to take notice of the divisions of parishes.

(1) Rex *v.* Stotfold, 4 Term Rep. 596.

(2) Rex *v.* Swalcliffe, Cald. 248.

(3) Spitalfields *v.* Bromley, 18 Vin. 468.

 The

The stat. 13 & 14 Car. II. which takes notice of the divisions of parishes, directs the removals of paupers, not to such divisions, but to such parishes. It would introduce extreme confusion and inconvenience, if townships might lie by in this manner. There does not exist such a place as the parish of Kirkby Stephen for the purpose of maintaining the poor, and Kirkby Stephen could not get rid of this order but by appeal: an order unappealed from is undoubtedly final. (1)

Conclusive up to what

Such an order is conclusive of the settlement of those who are affected by it, up to the period at which the parish ought to have appealed (2), and is only to be superseded by a settlement gained by some subsequent act. (3)

Puts an end to contract of service.

It has been considered as sufficiently powerful to put an end to a contract of service. A yearly servant removed by such an order, from his master's service without his consent, but who returned to him again, and served out a month, being the remainder of his year, was held deprived of his settlement, as there had been no appeal from the order. (4)

But where the party occupied a tenement of

But a person who rented a tenement of the value of 10l. *per annum*, for some years, being removed by an order of removal, returned the same day to his tenement,

(1) Rex *v.* Kirkby Stephen, 2 Bott, 675. Pl. 736.

(2) See post. 131. (2). as to the time.

(3) See the opinion of Grose, J. Rex *v.* Kenilworth, 2 Term Rep. 598.

(4) Rex *v.* Kenilworth, ante, (3). and Vol. i. 388. and see the note, ib. But as the order was conclusive of the settlement, up to the time of removal, see Rex *v.* Fillongley, post. 131. (1), perhaps it would have made some difference if he had served 40 days subsequent thereto. At least it would have raised the question whether the old contract continued, and the order prevented the services from connecting.

and

and resided there, without coming to any new contract with his landlord, and without interruption for three quarters of a year. An appeal against this order was entered, but never prosecuted. It was held conclusive of his settlement only up to the time it was made; for there was nothing in the order to prevent his return, provided he did not come back in a state of vagrancy, which he did not do; for it was not in the power of the magistrates who made the order, nor of the justices at sessions on appeal, to put an end to the contract between the parties, respecting the taking of a tenement; when it is stated that he rented and resided on a tenement of 10l. *per annum*, that infers a contract, which, as it could not be dissolved by the justices' adjudication, still remained; wherefore he gained a sttlement by residing 40 days. (1) 10l. per ann. it was held conclusive, only to the time of the removal.

In this case the order was said to be conclusive of the settlement, up to the period of the removal. (2)

SECT. V.

Of the Evidence necessary to establish this Species of Settlement.

THE proof is plain and direct in all these cases. Proofs what.

In the 1st, proof of such facts of relief as shew that it was given to the party as settled, and not as casual poor, is sufficient. 1. By relief.

In the 2d, proof of identity, and the due execution and delivery of the certificate. (3) 2. Certificate.

(1) Rex *v.* Fillongley, 2 Term Rep. 709.

(2) Ib. But quære whether it goes beyond the time of making the order.

(3) See post. tit. Certificate.

In

3. The order.

In the 3d, the order must be proved to have been duly made. Proof of the magistrate's hand-writing is good *prima facie* evidence of this (1). Some proof should be given that the order has been put in execution, by removal of the parties to whom it relates; and if there be any doubt respecting their persons, they must be identified. But it seems unnecessary for the party relying upon the order to shew that it was not appealed from, for that is to be presumed, until the contrary is shewn.

Of recording orders of removal.

To avoid any difficulty which might arise as to this proof, it is stated by Holt, C. J. that "the most regular way for justices to proceed upon the 14 Car. II. in removing a poor person, is, to make a record of the complaint and adjudication, and upon that, to make a warrant under their hands and seals to the churchwardens (2), to convey the persons to the parish to which they ought to be sent, and deliver in the record *per proprias manus* into court next sessions, to be kept there amongst the records to charge the parish; and that the record may be well removed by a general *certiorari* to the justices of the peace." (3)

It seems from this as if a due execution of the warrant by the parish officers might be presumed, or at all events, that recording the order is a matter of sufficient legal notoriety, to enable the parish to which the removal is directed to be made to come in and dispute the fact, if it should be otherwise.

Additional precaution.

But Dr. Burn suggests, as an additional precaution, "that the justices who make the order have a right to see it executed; and therefore they may inquire upon oath,

(1) Ante, Vol. i. 534. (8), &c. and see Barleycroft *v.* Coleoverton, 1 Str. 94. As to what is necessary to render an order of removal valid, see post. chap. xxviii.

(2) Quære if not the church-wardens and overseers?

(3) Anon. 1 Salk. 406.

whether

whether the removal was duly made? and if it was, they may record the whole; which record being delivered at the next sessions, and the court likewise recording that no appeal was made, perhaps the parish may be concluded." (1)

(1) 3 Burn's Just. tit. Removal, post. chap. xxviii.

CHAPTER XXVII.

By whom a Settlement may be acquired.

Who may acquire settlements: 1. A wife.

IT has been already shown, that a wife cannot acquire a settlement by any act of her own, during her husband's life-time. But she may retain her maiden settlement under particular circumstances. (1)

2. Child under 7.

It is said, that a child cannot acquire a settlement while under the age of seven years. (2)

All natural born subjects may.

A prisoner within the rules.

But with these exceptions a settlement may be acquired by all the natural subjects of the king, born in any part of his dominions annexed to the crown of England (3). A prisoner in custody of the warden of the Fleet was held to acquire a settlement, by renting and residing upon a tenement of the annual value of 10l. situate within the rules of that prison. (4)

Alien.

A subject of any country at peace with the crown of England, or, as he is called in law-language, an alien amy, may likewise acquire a settlement by occupying a tenement of the value of 10l. a-year. (5)

(1) Ante, Vol. i. 258.

(2) See Burn's Just. tit. Settlement. Rex *v.* Saxmundham, 1 Bott, 22. Pl. 40. But quære whether an infant of these years labours under a disability of gaining a settlement in all cases. See Rex *v.* Hasfield, ante, 58. (4). Rex *v.* Houghton Le Spring, ante, 58. (4).

(3) See the opinion of Lawrence, J. Rex *v* Eastbourne, 4 East, 103.

(4) St. Margaret's Westminster *v.* St. Martin's Ludgate, 2 Str. 924.

(5) Rex *v.* Eastbourne, ante, (3).

If it be necessary that an alien should have a permanent interest in lands or tenements situated within the realm, he cannot acquire a settlement by estate, except in a few instances.

He cannot take a freehold estate in lands or tenements, either by descent or purchase (1). A woman alien cannot be endowed, unless she marries by the king's licence (2). Neither can an alien husband be tenant by the curtesy (3). So likewise a foreigner is in most instances prohibited from acquiring a leasehold interest. He cannot hold a lease for years of meadows, pastures, or the like (4). But an alien merchant may rent a house, which it seems is more than any other foreigner can (5). And 32 H. VIII. c. 16. makes leases of dwelling-houses or shops, *granted* to any stranger artificer, void (6); a foreigner, however, may hold a term, either as executor (7), or administrator. (8)

Incapacity as to freeholds.

As to leaseholds.

The capacity to take a freehold or other interest in real property is given either by letters of denization, or by act of parliament, to naturalize the party. But as the

How they may acquire it.

(1) Black. Com. chap. 2. 372.

(2) Hargr. Co. Lit, 31. a. n. 9.

(3) 7 Co. 25.

(4) 1 Woodes. Lect. 372.

(5) Ibid. Co. Lit. 29. b.

(6) See Pilkington *v.* Peach, 2 Show. 135. Hargr. Co. Lit. 2. n. 7. 1 Woodes. Lect. 373. Rex *v.* Eastbourne, ante, 281. (3). But if a statute like this is to be construed with literal strictness, there are cases of leasehold estates to which it does not extend, as it only includes houses and dwellings leased to artificers. Merchants, and other foreigners may, therefore, take a lease, as indeed an artificer may do of messuages not necessary to carry on his trade, such as stables, coach-houses, and other convenient houses, to put his necessary goods in. See Jevens *v.* Harridge, 1 Saund. 6. Nay, an artificer may become entitled to a leasehold interest in houses and dwellings, by means, not within the words of the act, as by marriage or devise; he may also hold without lease. Pilkington *v.* Peach, 2 Show. 135.

(7) Upwell's Caroon's case, Cro. Car. 9. See also Woodes. Lect. 377.

(8) See Caroon's case, ante, (7).

capacity or incapacity of an alien to acquire a settlement by estate seems to rest on the same principle as that of a person attainted of treason or felony before he is restored in blood; the competency of both seems supported to this extent, by the authority of a recent decision in the Court of King's Bench, *viz.* that an attainted felon discharged under the sign manual, acquired a settlement for himself and his unemancipated child, by purchasing a copyhold for more than 30l. upon surrender formally made, and upon which he had subsequently resided, and received the issues and profits for nine years. (1)

By

(1) Rex *v* Haddenham, 15 East, 463. It was contended against the settlement, 1. That in order to gain a settlement on a man's own property, he must have some estate or interest vested in him. Rex *v.* Widworthy Burr. S. C. 109. Rex. *v.* Cold Ashton, Ibid. 450. Rex *v.* Painswick, Ibid. 783. Rex *v.* North Curry, Cald. 137. and Rex *v.* Chew Magna, Ibid. 365. 2. That the sign manual, with the letter of the Secretary of State, did not restore the capacity of an attainted person, Gulley's case, 1 Leach. Cr. Cas. 115. Fort. Cr. Law. 62. 1 Black Rep. 479. 3. That an attainted person cannot hold freehold, much less copyhold property. Co.Lit. 2. 6. Dyer: 2.b. Treby's note in marg. The King *v.*. Wendman, Cro. Jac. 81. Duke of York *v.* Matsham, Hardr. 432. 7. Benison *v.* Strode, T. Jones, 189. Polleaf. 615. and the doubt expressed by Lord Kenyon, in the case of Rex *v.* St. Mary in Cardigan, 6 Term Rep. 117. was relied upon as of great weight in favour of the objection. Sed per Lord Ellenborough, C. J. "It was only "said by Lord Kenyon, that whether "the man could acquire a settlement "after the attainder, was another "question from that which he was "then called upon to decide; and so "it was: but this was only declining "to decide a larger question than he "was then called upon to do The "point raised is of some doubt, and of "more general importance than usu-"ally arises on settlement cases. In "the form of it, a purchase was made, "which satisfies the terms of the sta-"tute 9 Geo. 1. c. 7. s. 5. that no "person shall acquire any settlement "in any parish, for or by virtue of "any purchase of any estate or inte-"rest in such parish, whereof the con-"sideration for part purchase doth "not amount to 30l. bonâ fide paid, "for any longer time than such per-"son shall inhabit in such estate, &c. "Now this was in its form a purchase "for more than 50l., and he resided "on it for more than 40 days, and he "has not been removed from it. Who "then was in a condition to remove "him for the 40 days? The lord, "who has, by admitting, accepted him "for his tenant, even if he could after "that admission object to him, has not "objected

By 35 Geo. III. c. 101. s. 4. no act done by any poor person continuing to reside in any parish, township, or place, under the suspension of an order for their removal, or of a vagrant pass for passing them, shall be effectual, either in the whole or in part, for the purpose of giving him or her a settlement in the same. (1)

"objected. If the lord had no notice "of the objection at the time of the "admission, I do not mean to say "that he was afterwards precluded "from making the objection; but he "has not, in fact, objected; and "the tenant has now continued for "nine years in possession, and by "the statute of limitations, part of the "rents, issues, and profits can no longer "be recovered from him. So that if "he had a defeazible estate for the "first 40 days, he has held the estate "undefeated for more than that pe- "riod, which cannot now be im- "peached. And whether or not the "Crown could have impeached his "title, he has now held the estate un- "der a title not defeased for above "forty days." The other Judges assented.—Order confirmed.

(1) Quære, if a woman should marry an inhabitant settled in the parish, or an estate should come to a person so residing, by act of law, are they prevented from acquiring settlements by reason of this clause; or are they excepted from its operation as not being "acts done by the poor "person?"

CHAPTER XXVIII.

Of the several Situations in which Persons are irremovable.

THE 13 & 14 Car. II. c. 12. enabled parish officers to remove all persons not settled in their parish, and endeavouring to settle themselves, and likely to become chargeable there, to the place of their last legal settlement (1). Besides the exceptions expressly made in the statute, some peculiar cases were considered, as not being within its policy or purview, so as to render persons in such situations removable under the act. The humanity of the legislature had introduced several subsequent exemptions from the general law, by rendering persons irremovable until they became an actual charge to their place of residence, of which the principal are those created by laws which respect certificates. Finally, in the same anxious spirit to alleviate the misfortunes of the poor, an act was passed, 35 Geo. 3. c. 101., by which all persons are rendered irremovable until actually chargeable to the place they inhabit, except under special circumstances, which will be noticed more particularly in considering the provisions of that statute.

Prior to treating of the law of removals to the place of settlement, it seems proper to consider, as preliminary thereto, 1. What persons are irremovable under 13 & 14 Car. II. although actually chargeable to the place they inhabit. 2. The laws respecting certificates. 3. The effect and operation of 35 Geo. 3. c. 101. upon this particular subject.

(1) Ante, vol. 1. 249.

PART I. SECT. I.

Of Persons irremovable under 13 & 14 Car. 2. although actually chargeable.

THE impediments which may exist to prevent the removal of those who apply for parish relief, are of two kinds: 1st, Where the removal would interfere with some relationship in which the pauper stands towards a third person, and which the law will not suffer to be interrupted without such person's consent. 2d, Where the justices have no jurisdiction.

Persons irremovable.

1st, From connection.

2d, Want of jurisdiction.

The connections which prevent removals are of three kinds: 1st, Husband and wife. 2d, Children within the age of nurture. 3d, A master and his apprentice or servant.

These connections are, 1st, Husband and wife. 2d, Master and apprentice, or servant.

If a married woman intrudes into a parish, apart from her husband, she may be removed to the place of his settlement, if he has one (1); and if he have none, she may be sent to her maiden settlement. (2)

Married women, when removable.

But no order can separate husband and wife against their consent (3). Where a wife stands in need of parish relief, the husband becomes chargeable from his inability to maintain her, whom the law calls upon him to sup-

Cannot separate husband and wife.

(1) Rex *v.* Higher Walton, Burr. S. C. 162.

(2) Ante, Vol. i. 258.

(3) St. Michael's in Bath *v.* Nunny, 1 Str. 554. Burr. S. C. 815. Rex *v.* Carleton, Burr. S. C. 813.

port.

port (1). If he reside with her, and has a settlement, they shall be removed thither; or if the woman is removed alone, and the husband is living, he may be sent afterwards to his family (2). But if the husband is a foreigner, and have no settlement, the wife cannot be removed without his consent, although she asks a temporary relief, because the husband has no settlement to which he can be sent; and he and his wife shall not, against their will, suffer such a temporary divorce from each other. (3)

Unless by consent.

Yet in such a case, if the husband and wife consent to her removal with their children to her maiden settlement, an order to that effect is valid; because married persons of an inferior condition in life must frequently separate, for the purpose of subsisting by their labour: there is neither public nor private injury in their doing so. (4)

It must appear expressly by the order that it separates them, or it is good.

As every thing is to be presumed in favour of an order, it shall not be intended that they are thereby separated, unless the fact expressly appears on the face of the order itself (5). A separation is not to be presumed therefore, although the order states that the husband was examined at the time of making it; for he might be before the magistrates, without residing in the parish (6). On the contrary, where the wife is removed alone to the place of her last legal settlement, it shall be intended to be that of

(1) Waltham *v.* Sparkes, Skin. 556. Comb. 221. See the reasoning of the judges in Rex *v.* St. Mary Westport, 3 Term Rep. Mr J. Ashhurst seems to extend the principle even to the case of a grandfather and grandson. "Here the relief was not given, (i. e. to the son and grandson) on the application of the grandfather; and in order to extend the consequences of this relief to him, the parish should have first called upon him, when if he had refused, alleging his inability, it might perhaps have been tantamount to a relief of the grandfather."

(2) Per Lord Mansfield, C. J. Alton *v.* Eltham.

(3) Rex *v.* Carleton, ante, 139. (3).

(4) Rex *v.* Eltham, 5 East, 113. See also Rex *v.* Hooe, 4 East, 103.

(5) St. Michael's, Bath *v.* Nunny, ante, 139. (3).

(6) Rex *v.* Eltham, ante, (4)

her.

her husband (1), and that *he is* at the place where he is legally settled. (2)

2. Upon the same principle, children within the age of nurture, cannot be removed from their parents, whether legitimate (3) or otherwise. (4)

2. Children.

The remaining connection, which the law does not suffer to be broken, is that of a master and servant, or apprentices, for they stand upon a similar footing: these contracts cannot be dissolved, or the parties separated against their consent (5). But if the master is unable to maintain them, and is bound to do so by the terms of his contract, it is, perhaps, a sufficient ground to deem him chargeable, and to remove him as such (6). A case occurs,

3d, Master and apprentice, &c.

(1) Rex *v* Higher Walton, Burr. S. C. 132. ante, 139. (1). Rex *v.* Cheshunt, Doug. 46. Cald. 42.

(2) Rex *v.* Ironacton, Burr. S. C. 153.

(3) Rex *v.* Cuckfield, Burr. S. C. 290. that they must be removed with the mother to her settlement. See Wangford *v.* Brandon, Carth. 449.

(4) Rex *v.* Hemlington, Cald. 6. post.

(5) Ante, Vol. i. 388. n. (1). Rex *v.* Ozleworth, Burr. S. C. 302. Rex *v.* Alveley, post. 142. n. (1). Quære tamen, whether this extended further than where a pauper was liable to be removed as likely to become chargeable. For Lee, C. J. says, "if a servant should become chargeable to a parish, I think he may be removed." Fittleworth *v.* Pulborough, 2 Const. 172. Pl. 226.

(6) See Rex *v.* St. Mary Westport, 3 Term Rep. 44. ante, 142 (1). Such cases are not likely to occur. But it seems hard upon the parish, if they have neither power to remove the indigent apprentice or servant from the master, nor the latter with the servant or apprentice, where he is unable to maintain them, or else to withhold relief altogether, if they refuse to put an end to their contract. Something, however, may depend upon the nature of the agreement between the master and his servant, or apprentice. For a master is not in all cases bound to find them in necessaries, but may stipulate, that they shall find themselves. See Wennall *v.* Adney, 3 Bos. and Pull. 247. as to servants. Rex *v.* Portsea, ante, Vol. i. 463. Rex *v.* Walton en le Dale, Ibid. as to apprentices. It was even doubtful, whether a master could be compelled to provide for a parish apprentice prior to 8 & 9 W. III. c. 30. s. 9. See the opinion of Lord Kenyon, C. J. Rex *v.* Leighton, ante, Vol. i. 464. But the master's inability, where he is under a legal obligation to provide for his apprentice, is a good ground to discharge the inden-

occurs, however, in the last section, which shews that a servant, although chargeable to the parish, in the legal sense of the word, was held not removable against her master's consent, pending the contract of service. (1)

But if a servant be well settled in the parish, and the master is removable, it is said that the former cannot be removed with him, under 43 Eliz. (2)

2d, Magistrates want jurisdiction to remove.

The 2d case in which magistrates are unable to remove, arises from a deficiency of jurisdiction.

1st, Persons residing on their own estate, although within 9 Geo. I.

1st, Persons residing upon their own estate, howsoever acquired, or whatever the value, though actually chargeable. For 13 & 14 Car. II. gave no power to remove persons living upon their own estates, and the 9 Geo. I. does not enable the justices to remove them, but only declares, that "no person shall be deemed to acquire a settlement in any parish, by virtue of any estate or interest in such parish, whereof the consideration doth not amount to 30l. &c. *for any further or*

indentures, and also a contract of hiring where the justice has jurisdiction. It was ruled by Lord Kenyon, that if a servant, living under the roof of his master, falls sick, the master is liable for medicines provided for the servant. Scarmen *v.* Castell, 1. Espin. Ni. Pri. Cas. 270. And Lord Eldon, C. J. seemed of the same opinion, provided the servant's illness has not been the consequence of his own misconduct or debauchery. Simmons *v.* Wilmot, 3 Espin. Ni. Pri. Cas. 91. But it has been since determined, that the master is not liable, upon an implied promise, to pay for medical assistance, afforded to a servant, to whom he had agreed to give yearly wages and victuals, who had broken his arm, and was carried to the servant's mother's house, where he was cured; and the doctrine in Scarman *v.* Castell was questioned by the court. Wennall *v.* Adney, 3 Bos. and Pull. 247. It had been likewise determined, that where a yearly servant broke his limb by a fall from the shafts of his master's waggon, the master was not liable to the parish for the expence of supporting and curing him. Newby *v.* Wiltshire, Cald. 527. 2 Espin. Ni. Pri. Cas. 732. See post. title, Maintenance of casual Poor.

(1) Rex *v.* Alveley, ante, 141. (5).

(2) Comb. 478. 14 Vin. Abr. 439.

longer

longer time than such person shall inhabit in such estate," and shall then be liable to be removed, &c. (1)

But a person is not irremovable from a mere local privilege or franchise, to which he is entitled as a freeman. (2)

2d, Family residing on tenement of 10l. per ann. where husband dwells elsewhere.

2d. A man's wife and family, resident upon his or her estate (3), or upon a tenement of the value of 10l. *per annum*, notwithstanding the husband dwells elsewhere, cannot be removed. For although the wife cannot acquire a settlement during his life (4), yet not only the husband, but his wife and family, are irremovable in such a situation, because they do not "come to settle in a tenement under the yearly value of 10l." (5)

3d, Persons in extra-parochial places.

3d. Persons born in extra-parochial places, for which no overseers are appointed, cannot be sent thither as to their place of settlement; nor can the poor who reside there be removed; for neither the 43 Eliz. nor 13 & 14 Car. II. extend to these places, or give the justices any jurisdiction over them (6). But if the place is a vill or township, so as to admit of having overseers, the magistrates should first appoint them, and then make their order. (7)

(1) Rex *v.* Martley, 5 East, 40. See Rex *v.* Dunchurch, Burr. S. C. 553.

(2) Rex *v.* Warkworth, East, 53 Geo. III. Maule and Selw. M.S.

(3) Per Lee, J. Berkhamstead *v.* St. Mary, Northchurch, 2 Bott. 33. Pl. 56. and see Rex *v.* Aythorp Rooding, Burr. S. C. 412.

(4) See ante, vol. i. 258. n. (3).

(5) Rex *v.* Leeds, Burr. S.C. 524. 2 Bott. 143. Pl. 187.

(6) Bridewell *v.* Clerkenwell, 2 Salk. 486. Dean *v.* Linton, 2 Salk. 487. Rex *v.* Tamworth, Cald. 28.

(7) Ante, vol. i. 16.

4th.

4th, Persons without settlement.

4th. This rule seems, upon the same principle, to apply to the case of persons born out of England or Wales, and not having gained a legal settlement there (1), as well as to all other casual poor.

A day-labourer settled in I. was employed to drive a load of hay from thence to B. and return with a load of muck; in loading the muck, he fell, and broke his leg, and it was held, "that an order for removing him was ill; for no person is removable from the parish where he is, but by positive statute. The 13 & 14 Car. II. c. 12. (the statute which confers the power of removing,) after reciting, that poor people endeavour to settle themselves in those parishes where there is the best stock, &c.; and when they have consumed it, then to another parish, &c. says, that it shall be lawful, on complaint of the parish officers, within 40 days *after any such person coming so to settle as aforesaid, in any tenement under the yearly value of* 10*l.*, for any two justices of the peace of the division where any person likely to be chargeable to the parish shall *come to inhabit*, by their warrant to remove him to the place of his last legal settlement. The expression "coming to settle" denotes that the party comes *animo morandi* or *manendi*: it may be for a temporary purpose, but still it must be understood that he comes to settle there. How can it be said that the pauper went into this parish *animo morandi* at all? He went into the town with a cart of hay, which he was to dispose of, and return with a load of muck. How then can it be said that he went there to settle? (2)

The Court were likewise of opinion that the power of removal was not in anywise enlarged, so as to extend

(1) See Conrad's case, Comb. 287. Poor's Sett. 287. called Cowred's case, 2 Bott, 21. Pl. 37.

(2) Per Lord Ellenborough, C. J. Rex *v.* St. James, in Bury St. Edmunds, 10 East, 25.

to

to this case, by 35 Geo. III. c. 101.; for that act meant to provide, that persons who by law were before removable if likely to become chargeable, should not be removed till actually so; and to make provision for suspending the order of removal when made, in case of sickness and infirmity; and that the expences incurred in the care and maintenance of the persons between the order to remove and the actual removal of them, should be defrayed by the parish to which they should be found to belong. (1)

Pauper removing from A. to B for occasional relief, removable.

A pauper renting a house and residing at I., from which parish she occasionally received relief, upon applying as usual for relief, was refused, and desired by the officers to go into F., in which parish some of her husband's relations had resided; and upon doing so she was, by the officers of F., refused relief, and sent back to I., when it was again denied her, and she was desired to apply once more to F., but expressing her unwillingness to do so, one of the overseers took her to F. without any order of removal, the officers of which latter parish relieved her, and threatened to send her to prison if she returned to I. The pauper was desirous of returning to her house at I., but owing to the threats of the officers of F., she remained there eight or ten days when she was removed from thence to B. It was contended that the pauper was not a proper subject of the laws of removal because she did not go into F. to settle or inhabit, but was compelled to be there by a species of duress of the parish officers themselves. But the Court were of opinion that this temporary relief being necessary to prevent her from starving, she was liable to be removed from either F. or I. to her proper parish.(2)

(1) Per Ld.Ellenborough, C.J. Rex v. St. James, in Bury St. Edmund's, 10 East, 25. and see post. sect. 8. and chap. 34. sect. 1, 2. and 4. The same point was ruled, in Rex v. Thatcham, M. 49 Geo. III. in a case nearly alike in circumstances. 10 East's note, Index, title Poor, Removal.

(2) Rex v. Birmingham, Trin. 51 Geo. III. 14 East, 251.

PART II. SECT. I.

Of the Statute respecting Certificates.

Statutes. 13 & 14 Car. II. c. 12. s. 3.

THE statutes upon which the law of certificates depend are, 1st, 13 & 14 Car. II. c. 12. s. 1. which relates principally to certificates given to poor and able-bodied persons removing occasionally from their places of inhabiting, to procure work; and is granted by the minister of the parish, one churchwarden, and one overseer. 2d, 8 & 9 W. III. c. 30. 9 & 10 W. III. c. 11. 12 Anne, c. 18. s. 2. and 3 Geo. II. c. 29. s. 8. 9. (1)

Object of 8 & 9 W. III. c. 30.

The object of 8 & 9 Will. III. c. 30. was to enable the poor to remove with facility from their places of settlement, and become inhabitants of other parishes, that they might gain a livelihood without being a burthen there. It makes those who reside under certificates irremovable, until actually chargeable, and in return prohibits them from acquiring settlements while they dwell under its protection, "unless he or they shall really and *bona fide* take a lease of a tenement of the value of 10l. or shall execute some annual office in such parish, legally placed in such office."

Applied only to the natural family.

12 Ann. c. 18. applied

But this statute applied only to persons mentioned in the certificate, and those who could claim settlements from them as natural parts of their family. The 12 Anne, c. 18. s. 2. passed, therefore, to prohibit apprentices and

(1) For these statutes, see the Appendix.

servants

servants of certificated persons from acquiring settlements as such. (1)

to apprentices and servants.

Protection of certificate, and inability to gain settlement, coextensive.

The general principle of this law is, that the certificate's protection and party's inability to acquire a settlement are co-extensive. As it obliges a parish to receive a person to whom the certificate is granted, together with his family, it holds out in return an indemnity to the parish receiving them, that neither he nor any *of his family* that then is, or thereafter shall be, shall, while they continue such, bring any burthen upon it. (2)

Those who reside under a certificate therefore cannot acquire settlements, except by the methods prescribed in the 9 & 10 W. III. c. 11. (3). But if unprotected by it, they may do so in the same manner as any other person. For wherever a certificate is not conclusive upon the parish granting it to receive the party back again, it does not prevent him from acquiring a settlement there. (4)

Division of subject.

The subject, therefore, may be divided into the following heads: 1st, The form of the certificate. 2d, To whom it extends. 3d, Its effect. 4th, Its continuance and determination.

(1) See the opinion of Lord Kenyon, C. J. Rex *v.* Hinkley, 4 Term Rep. 371. and of Lord Ellenborough, C. J. Rex *v.* Mortlake, 6 East, 397. post. (2).

(2) See the opinion of Grose, J. Rex *v.* Hampton, 5 Term Rep. 266. of Lawrence, J. Rex *v.* Mortlake, 6 East, 397.

(3) Post. 158.

(4) Per Lawrence, J. Rex *v.* Storrington, 7 Term Rep. 133. post. 157. (1).

PART II. SECT. II.

Of the Form of a Certificate.

Certificates to whom granted.

THE churchwardens and overseers of a parish may grant certificates, not only to able-bodied persons to enable them to acquire a livelihood, but likewise to the poor and impotent for particular purposes; as to protect them during residence in their work-house erected in another parish, for maintenance (1): or in an hospital for cure (2). They cannot be compelled to grant one in any case (3). But when granted, the following forms are required by statute.

Cannot be compelled to grant one.

Form of certificate under 8 & 9 W. III. c. 30. Under hand and seal of majority &c.

By 8 & 9 W. III. c. 30.

1st, It must be under the hands and seals of the major part of the churchwardens and overseers of the parish, township, or place, if it has churchwardens; or under those of the overseers, if there are none. 2d, It must be attested by two or more credible witnesses. 3d. It must be allowed of, and subscribed by two or more justices, within whose jurisdiction the parish or place which grants it lies.

Form of attestation

One object of 3 Geo. II. c. 29. s. 8. was to facilitate the mode of proving certificates (4), and it requires, in

(1) Rex v. St. Peter's and St. Paul's in Bath, Cald. 213.

(2) Dub. per Foster, J. St. George v. St. Olaves, Southwark, Burr. S. C. 205.

(3) Rex v. St. Ives, Sess. Cas. 153. where a motion for a mandamus to a parish to grant a certificate was rejected, as a strange attempt.

(4) Per Ashhurst, J. 2 Term Rep. 466.

addition,

addition, 4th, that the witnesses, or one of them, who attest the execution of the certificate, shall make oath before the justices who are to allow it, that he or they saw those parish officers, whose names and seals are affixed, severally sign and seal it. 5th, The justices are also to certify that such oath was made before them; and every certificate so allowed, and the oath of the execution so certified, shall be taken and allowed in all courts as fully proved, and shall be received in evidence, without further proof. under 3 Geo. II. c. 29. s. 8.

The certificate must, therefore, be signed and sealed by a sufficient number of parish officers. Must be signed and sealed by majority.

1st, Of signing certificates in parishes and townships having churchwardens.

The statute of King William had expressly given the power of granting certificates to the churchwardens and overseers jointly, or the major part of them; and in case there were no churchwardens, it gave the same power to the overseers alone, of whom there must have been at least two; but in no event did it give this authority to the churchwardens without the overseers. (1)

The point, whether a majority, both of churchwardens and overseers, were necessary to sign a certificate, had not been expressly decided. But it was held that unless it was signed and sealed by a majority of the aggregate body, it was altogether void. (2)*

(1) Per Lawrence, J. Rex *v.* St. Margaret's Leicester, 8 East, 334.

(2) It seems as if a majority of both were necessary; see the opinion of Lord Ellenborough, C. J. Rex *v.* St. Margaret's Leicester, post. 150. (3). Yet see the opinion of Lord Kenyon, C. J. Rex *v.* Beeston, 3 Term Rep. 952. post chap. xxxiii. sect. 3. and 51 Geo. III. c. 80. post. 131.

 Thus

Certificate by two church-wardens and two overseers, where six churchwardens and four overseers, void.

Thus a certificate executed by two churchwardens and two overseers of a parish, where there were six of the former and four of the latter, was held void. (1)

Majority of officers de jure.

It seemed, likewise, that certificates must under that act be signed by a majority of parish officers being such *de jure*; so that where a parish had four churchwardens and eight overseers, the certificate was invalid, as it would be impossible to distinguish which four of the eight overseers were legally appointed. (2)

It was likewise adjudged that a certificate signed by two churchwardens, one of whom was also appointed sole overseer in the same year, was a nullity. For by Lord Ellenborough, C.J. the certificate act 8 & 9 W. III. c. 30. requires that a certificate shall be granted under the hands and seals of the churchwardens and overseers of the parish, or the major part of them. How then can we say that what is directed to be done by two overseers at least, joined to the churchwardens, or the major part of them, can be done by one overseer and one churchwarden only, or by two churchwardens, one of whom acted in the double character of churchwarden and overseer. (3)

51 Geo. III. c. 80.

But many inconveniencies arose from these determinations; such for instance were those which respected the

(1) Rex *v.* Tamworth, Burr. S.C. 770. So a certificate under the hands and seals of one churchwarden, and one overseer of a parish, having two overseers and four churchwardens, was held void, Rex *v.* Margam, 1 Term Rep. 775.

(2) See Rex *v.* Wymondham, 6 Term Rep. 552. as explained by Lawrence, J. Rex *v.* Clifton, 2 East, 175. The fact was not sufficiently stated by the sessions, and the case was decided upon another point.

(3) Rex *v.* St. Margaret's Leicester, 8 East, 332.

binding

binding of parish apprentices (1) "in small parishes where two persons only had been annually appointed to act in the capacity of churchwardens as well as overseers," (2), to remedy which it was enacted by 51 Geo. III. c. 80. that all indentures for the binding of parish apprentices, and all certificates of the settlements of poor persons, which have been heretofore executed and signed by two persons only, acting or purporting to act in the capacity of churchwardens as well as of overseers of the poor, and also all such indentures and certificates as shall thereafter be so signed, shall be considered as good, valid, and effectual as if the same had been executed and signed by distinct persons as churchwardens, and distinct persons as overseers of the poor according to 43 Eliz. c. 2."

2d, Of signing certificates where there are no churchwardens.

In a township, must be signed by two overseers. If only ointed, d signed by him, it is void.

The 8 & 9 W. III. seems to require that a certificate granted by a township, maintaining its own poor, and not having churchwardens, should be signed by all the overseers. No decision has occurred on this subject, but it has been determined, that it must be made by two overseers at least; for the appointment of one overseer only is bad in law, by 13 & 14 Car. II. c. 12. (3); and if but one is appointed, a certificate signed and sealed by him is void. (4)

Quære, whether parish church-

A further question arose in the preceding case, whether, where a township situate within a parish has no church-

(1) See Rex *v.* All Saints, Derby, 13 East, 143. ante.

(2) Preamble, 51 Geo. 3. c. 80.

(3) Ante, vol. i. 44.

(4) Rex *v.* Clifton, 2 East, 168. It seems as if the point might have been made in Rex *v.* Samborn, 3 Term Rep. 609., but it was not.

wardens must sign a township certificate? wardens of its own, and maintains its poor separately, the churchwardens of the parish at large ought to join with the overseers of the township in granting certificates? The court did not decide the point; but two (1) of the three judges present intimated as the inclination of their opinion, that it was unusual, might be inconvenient, and seemed unnecessary for them to do so. (2)

Name of office stated. The certificate should give to those who sign it, the addition of churchwardens or overseers, according to their official situation in the parish. Yet if the officers of an hamlet, situate within a parish, and maintaining its own poor, describe themselves as officers of the parish at large, and acknowledge the persons mentioned to be legally settled within the parish, it is not such a defect as vitiates the instrument, but may be explained by parol evidence of the fact. (3)

Justices have discretion to refuse or allow certificate. Form of attestation. The justices have a discretionary power to refuse or allow a certificate; but unless they allow it by regularly filling up the blanks, and signing their names, it is not within the act, and cannot conclude the parish (4). And if the justices appear to sign only as witnesses, without using words to signify their allowance, it is not sufficient (5). But the same person may under 8 & 9 W. III. c. 30. allow as magistrates, and attest as witnesses, when it appears they take upon them to act in both capacities. (6)

(1) Lawrence and Le Blanc, J.

(2) Rex v. Clifton, ante, 151. (4). But see 2 & 3 Ann. c. 6. s. 5. by which this is cured, as also 17 Geo. II. c. 38. sect. 15.

(3) Rex v. Samborn, 3 Term Rep. 609.

(4) Rex v. Wooton St. Lawrence, Burr. S. C. 581. Rex v. Boston, Str. 94.

(5) Rex v. Boston, ante, (4.)

(6) Ib.

A cer-

A certificate was attested by A. B. a marksman, and P. I. The justices certificate and allowance was as follows: "We, &c. do hereby certify, that he, the said P. I. came before us, this day, and made oath that he was present with the other witness above mentioned, and did see the said churchwardens and overseers severally sign and seal the said certificate; and that his name is of his own proper hand-writing. And we do allow of the certificate above written." It was argued, that this certificate was insufficient; for 3 Geo. II. c. 29. s. 8. requires, that the attesting witnesses, or one of them, shall make oath before the justices who allow it, "that such witness or witnesses did see the execution of it; *and that the names of such witnesses attesting the certificate* are of their own proper hand-writing." Whereas here, the name or mark of A. B. was not proved to be his own hand-writing, for P. I. only proves, that his own name is of his own hand-writing. But the whole court were extremely clear, that there was sufficient proof of A. B.'s attestation. P. I. swears, "that he was present with B. and did see the churchwardens and overseers severally sign and seal the said certificate." *And this is above thirty years ago* (1). It would be very unreasonable, that the parish, who gave the certificate so long ago, should quibble it off in this manner now. (2) Attestation under 3 Geo. II. c. 29.

It seems that 3 Geo. II. c. 29. was only passed for the purpose of facilitating the proving certificates, and was not intended to take away any mode of proof which existed prior to the statute (3). A certificate therefore under 8 & 9 W. III. is good, for that act certainly is not repealed by 3 Geo. II. (4) 3 Geo. II. c. 29. passed, to facilitate proof of certificates, and does not take away any previous mode of proving, nor repeal the form under 8 & 9 W. III.

(1) See Rex *v.* Farringdon, post. (3).

(2) Rex *v.* Ashton Reynes, Burr. S. C. 725.

(3) Per Ashhurst, J. Rex *v.* Farringdon, 2 Term Rep. 466.

(4) Per Buller, J. Ib.

Thus,

Thus, a certificate more than thirty years old, regularly allowed and signed by two justices, according to 8 & 9 W. III. was held valid, without further evidence, although it did not certify the affidavit of the witnesses, in the form prescribed by 3 Geo. II. c. 29., because a certificate of that age proved itself. (1)

But where a certificate of attestation is relied upon as proof of the original certificate, the forms required by 3 Geo. II. c. 29. must be strictly followed.

Insufficient allowance under 3 Geo. II. c. 29.

The certificate in the preceding case, was stated in the margin to be "allowed by us, being first proved to be duly executed as the statute in that case directs and appoints." It was signed by two justices, but this allowance did not in any other manner certify an affidavit made by one of the witnesses according to 3 Geo. II. c. 29. On the other leaf of the same sheet of paper was a writing purporting to be made by the same two justices, but not signed by them, certifying that such an affidavit was made. Two judges doubted whether the requisites of 3 Geo. II. c. 29. had been sufficiently complied with (2). But the remaining judge (3) thought, that every thing (as in the case of a justice's order,) should be intended in favour of the attestation, and as the magistrates had stated, "that it was proved to be duly executed, it must be supposed to be so; because if the formalities required by the act were not complied with, the certificate would be false."

Direction of certificate.

A certificate is not a transferrable instrument from one parish to another (4). But it need not be directed

(1) Rex *v.* Farringdon, ante, 153. (3).
(2) Ashhurst and Grose, J.
(3) Buller, J.
(4) Per Lord Kenyon, C. J. Rex *v.* Wymondham, post. 155. (1).

to

to any particular parish (1), for it takes effect only by delivery (2), and a mistake in the direction does not vitiate it. (3)

The 8 & 9 W. III. requires, that it be delivered to the parish officers of the certificated parish, in order to prevent the party's removal from thence, or his acquiring a settlement there. (4) Delivery.

PART II. SECT. III.

To whom a Certificate extends.

A Certificate extends to three classes of persons. 1st, Those actually named in it; 2d, Those who are part of the person's family at the time it is granted; 3d, Those who become so while he continues to reside under it (5). It extends therefore to all who are mentioned expressly, although they afterwards live away from their parent, and form the head of another family (6). But unless

To whom it extends.

Family named.

(1) Rex v. Lillington, 1 East, 488. where the direction was "To the churchwardens, &c. of the parish of H., or any other parish in the city or county of Coventry." A dictum in Rex v. Wymondham, 6 Term Rep. 552., seems contra, but see it explained in the foregoing case; and the opinion of Chapple, J. Rex v. St. Nicholas in Harwich, post. (3).

(2) Rex v. Wensley, 5 Term Rep. 154. ante, 125. (3).

(3) Rex v. St. Nicholas in Harwich, Burr. S. C. 171. The direction was "To the churchwardens and overseers of the poor of the parish of Harwich, near Dover-court, &c." The session found that the proper name of the parish was "St. Nicholas in Harwich," and that there was no such parish as Harwich near Dover-court.

(4) Rex v. Wensley, ante, (2).

(5) See the opinion of Grose, J. Rex v. Storrington, 7 Term Rep. 133.

(6) Rex v. Testerton, 5 Term Rep. 258. Per Lord Kenyon, C. J. Rex v. Darlington, 4 Term Rep. 797. Rex v. Bath Easton, 8 Term Rep. 446. But these determinations do not create any distinction between children named and those who are not so, while they con-

unless where a person is thus described, it only includes such as live under the same roof with the *pater familias*, and form his fire-side (1), or in other words, constitute a part of his family or household. (2)

Extends to after-born children, and second wife.

It extends therefore to all his children, whether born before or after the certificate is granted (3); to those by a second wife, taken while the pauper resides under the certificate, after the death of a first, who had removed into the parish and resided with him under it (4), as also to the second wife herself, married under such circumstances. (5)

Certificate framed to exclude a son.

But as it is competent to the parties to limit the extent of a certificate, it may be framed so as to exclude, as well as to include, a person who would otherwise be considered as protected by it. The pauper's father, having resided some years in J., was removed with his two younger children to P., and shortly after returned with a certificate from P. acknowledging him and his two younger children settled there. The pauper was neither included in this order of removal, nor certificate; the parish officers of S. having declared before the magistrates, previous to the removal to P., that as the pauper got his own living, they had nothing to do with him. The pauper was, at the time of granting the certificate, about fourteen

continuo part of the father's family residing under the certificate; and therefore the child's derivative settlement shall shift with the father's whether named or otherwise. See Rex *v.* Leek Wooton, 16 East, 118. and particularly the judgment of Le Blanc J. Ibid. 124. Also Rex *v.* Cold Ashton, Burr. S. C. 444. Rex *v.* Dedham, Ibid. 528. there relied on. As to the effect of a certificate on the settlement of illegitimate children, see ante, vol. i. 288.

(1) Per Lord Kenyon, Rex *v.* Darlington, supra, 155. (6).

(2) Rex *v.* Mortlake, 6 East, 397.

(3) Rex *v.* Sherborne, Burr. S. C. 182. Rex *v.* Bray, Burr. S. C. 529.

(4) Rex *v.* Sherborne, ante, (3).

(5) Rex *v.* Hampton, 5 Term Rep. 266. Buller, J. dissent. upon the ground that the second wife was protected by the certificate, only as part of her husband's family, and that upon his death, she was no longer a part of it. See post. 160. (3).

fourteen years old, and after his father's return, supported himself by his daily labour, and lodged and boarded with his father at S. paying him five shillings a week. About two years after the father's return with the certificate to S. the pauper was hired and served in S. for a year, and was held to gain a settlement in the parish thereby, as not being included in the certificate. For though generally speaking, if a certificate be granted to the head of a family, it extends to all the members of that family; yet it is competent to the parties themselves to narrow the extent of a certificate; and that in question seems to have been specially framed for the purpose of excluding the pauper from the operation of it. It is not conceived in general terms, but after mentioning the father and mother, it goes on to specify the younger children, omitting the pauper who was the eldest; and it is a known maxim, that *expressio unius est exclusio alterius*. It could not have concluded the parish granting the certificate as to his settlement, because it was intended to exclude him from the certificate at the time it was granted. It follows therefore that he gained a settlement there by hiring and service(1).

But although the certificate extends to a son as part of the father's family, without being named in it, yet where he himself becomes the head of a family, then the words of the statute, public policy, and the convenience of mankind, require, that he should no longer be considered as part of his father's family, or be protected by the certificate granted to the father(2). Therefore, although a son lives with his father, yet if he marries and has children, a certificate does not extend to the grandchildren, either so as to render them irremovable, or prevent their acquiring

Does not extend to a son who becomes head of a family; nor to grandchildren.

(1) Rex v. Storrington, 7 Term Rep. 133.

(2) Per Lord Kenyon, C. J. Rex v. Darlington, ante, 155. (6).

quiring a settlement (1), unless the son is expressly named in the certificate. (2)

12 Ann. c. 18. s. 2.

The law respecting certificates is extended by 12 Anne, c. 18. s. 2. to apprentices and servants, whose masters reside under them. (3)

PART II. SECT. IV.

Of the Effect of Certificates.

Residents under certificates irremovable, till chargeable.

PERSONS who reside under a certificate cannot be removed until actually chargeable (4), although the certificate departs from the usual form, and promises to receive "the pauper and his family, when they shall be thereto requested;" for it must be taken to mean, when they shall be legally requested upon the party's becoming chargeable (5). And if the certificate is destroyed by casuality, and the parish refuse to grant a new one, it does not render him removable previous to his being so. (6)

Does not extend to a third parish. Son of certificated person

So also, as the certificate does not protect a person in his residence in a third parish (7), it cannot prevent him from acquiring a settlement there. Thus, a son born in the certificated parish, acquires a settlement either by

(1) Rex v. Darlington, ante, 157.

(2). Rex v. Heath, 5 Term Rep. 583. Rex v. Mortlake, 6 East, 367.

(2) Rex v. Bath Easton, 8 Term Rep. 446. But see Rex v. Leek Wooton, 16 East, 118, ante, 155. 161.

(3) See post. 159.

(4) Little Kiss v. Woodsall, 2 Salk. 530.

(5) Rex v. St. Mary Westport.

(6) For the pauper's testimony is, under such circumstances, sufficient to establish the certificate, Rex v. Hayder, 2 Bott, 566. Pl. 580., without argument.

(7) Ante, 147.

hiring

hiring and service (1), or by apprenticeship (2) in a third

settled by service in a third parish.

It has occurred to the court to determine the effect of certificates most frequently in the case of apprentices, but the principle applies equally to all parts of the certificated person's family. Apprentices and hired servants, who come into and reside in the parish under a certificate, are prevented, like all other persons, by 8 & 9 W. III. from acquiring a settlement. (3)

1. Apprentices and servants themselves certificated.

But the 12 Anne was meant to apply to the uncertificated apprentices and servants of certificated persons, who, previous to that statute, might acquire a settlement by serving them, in the same manner as any other inhabitant. The principle of this act is, "that the certificate-man shall not be an instrument of burthening the parish in which he resides, under a certificate with an apprentice (4)," or hired servant; but that the adventitious parts of his family may be excluded from settling there, as its natural members are by the act of William.

2. Of certificated persons.

This statute varies from 8 & 9 W. III. c. 30. in so far as it uses the words, "person coming to inhabit *or* reside," while the other has it, any person who "shall come into any parish there to inhabit *and* reside. Hence it was contended, that the words of the 12 Anne being in the disjunctive, includes the servants and apprentices of all persons who come into the parish under a certificate, although, in consequence of subsequent

(1) Rex *v.* Horsley, Burr. S. C. 385.

(2) Rex *v.* Silton, Burr. S. C. 269. Rex *v.* Petham, 2 Str. 1197. A certificate man's apprentice, who was assigned to a parishioner of another parish, and served there.

(3) See Alton *v.* Elvetham, 2 Bott, 280. Pl. 281.

(4) Per Aston, J. Romsey *v.* St. Michael, Burr. S. C. 640.

emanci-

emancipation, or other circumstances, their residence in the parish is not protected by it. But the court were of opinion, upon comparing the words of the statute of Anne with the provisions of former acts (1), that the word *or* must receive a copulative construction, and that the statute meant only to designate persons who come into any parish for the purpose of residing, and actually reside there, under a certificate. Where therefore one J. D. and wife removed into the parish of Great Marlow under a certificate, and while he resided under it, his son W. D. was born. W. D. afterwards left his father's family, married, and occupied a separate house, where he had a son T. D. This son, having been regularly bound, and serving as an apprentice to his father, was held to acquire a settlement thereby. For the father W. D. by becoming the head of a distinct independent family of his own, could no longer be considered as residing under the grandfather's certificate, and therefore was a person with whom an apprentice could gain a settlement. (2)

But wherever the master or mistress are protected in their residence by the certificate, either as the head or as a constituent part of a family, their apprentice, or servant is prevented from acquiring a settlement in the parish by serving them in these capacities.

Apprentice of certificate man's widow, gains no settlement.

A man and his wife came to reside in H. under a certificate, where the wife died; the man married again and died, after which his second wife took an apprentice, who gained no settlement by service under the indentures, because the second wife, and consequently her apprentice, resided under her certificate. (3)

(1) 8 & 9 W. III. c. 30. 9 & 10 W. III. c. 11.

(2) Rex *v.* Mortlake, 6 East, 397.

(3) Rex *v.* Hampton, ante, 156. (5).

A widow

A widow resided under a certificate granted to her husband, in which he alone was named. Her son born under the certificate continued to live with his mother, after his father's death, in the certificated parish, but carried on trade upon his own account. A servant hired by him for his business does not acquire a settlement, for the son not being emancipated, continues part of his mother's family; and as she is protected by the certificate, so is the son as part of her family. (1)

An apprentice who serves a certificated master under an assignment does not thereby acquire a settlement, any more than if he had been bound originally to him (2). And if originally bound to a certificated man, he does not acquire one by serving part of his apprenticeship, under a regular assignment, to an uncertificated inhabitant of the parish (3). For the 12 Anne, stat. 1. c. 18. having expressly provided that persons bound apprentices to certificated men should not, *by virtue of such apprenticeship, indenture, or binding, gain a settlement in such parish*, it is necessary that the binding should be such as would be capable of conferring a settlement by service under the original master in that place, otherwise no settlement can be gained there by virtue thereof. For the legislature intended, that no act whatever of this sort by a certificated man should help to bind the parish (4). Neither can one, originally bound into a certificated parish, gain a settlement by subsequent residence there, while his master resides in a third parish, provided the certificate is not abandoned. (5)

Or if serving a certificate man by assignment.

Or if original master certified and assigned by him to an inhabitant of that parish.

(1) Rex *v.* Sowerby, 2 East, 276. ante, vol. i. 284, (4); and see the opinion of Lawrence, J. Rex *v.* Alfreton, 7 Term Rep. 471.

(2) Romsey *v.* St. Michael, ante, 159. (4).

(3) Rex *v.* Hinckley, 4 Term Rep. 291.

(4) Per Lord Kenyon, C. J. Ib.

(5) Rex *v.* Spotland, Burr. S. C. 527.

Wherever master can gain settlement his apprentice may.

But wherever the master is not protected in his residence by the certificate, his apprentice or servant may acquire settlements by service in their respective capacities. An apprentice is, therefore, settled by residence in a parish to which the certificate does not extend (1), or by serving an uncertificated person residing in such parish under an assignment (2). So he may acquire one in the certificated parish where the master has received a certificate, but not delivered it, if he reside 40 days previous to the delivery (3); for the master might have gained one during that period (4). But if his master receives and delivers a certificate before the service of 40 days is complete, the apprentice cannot acquire a settlement afterwards, for he is under an absolute disability of gaining one, unless he is bound, and serve 40 days to a man who did not come into or reside, during that time, in the parish by means or licence of a certificate. (5)

But so soon as the certificate is discharged, either as to the master (6), or specially as to the apprentice, he may acquire a settlement in the same manner as any other person might. (7)

(1) Rex *v.* Bishopside, Burr. S. C. 381. Rex *v.* Spotland, supra, 161. (5).

(2) Rex *v.* Petham, Burr. S. C. 154.

(3) Rex *v.* Wensley, 5 Term Rep. 154. ante, 153. (2).

(4) Rex *v.* Clifsthydon, Burr. S. C. 151.

(5) St. Cuthbert's *v.* Westbury, Burr. S. C. 470.

(6) Rex *v.* Birdham, Cald. 500. Rex *v.* St. Peter's in Derby, 1 Term Rep. 218. when the certificate was discharged by the master's obtaining one to another parish.

(7) Rex *v.* Weddington, Burr. S. C. 766. Here the indentures were discharged, and the apprentice went and served another master under other indentures in a third parish for four years, after which he served two years under indentures in the certificated parish, and was also hired for and served a year there. See ante, 159. (1), (2).

PART

PART II. SECT. V.

Of the Continuance and Determination of a Certificate.

A CERTIFICATE may be discharged altogether as to the entire family, or continued as to part, and determined as to the remainder. (1) Certificate discharged in part.

This may be effected in various ways. How discharged.

1st, By a removal of the pauper by the certificated parish, to that which granted the certificate (2), or by a third parish, either removing him thither (3), or to that to which the certificate was given (4), if there is no appeal against the order. 1st By an order of removal.

2d, By granting a new certificate to another parish. (5) 2. A new certificate

3d, By the pauper's voluntary deserting the certificate by removing from the parish to which it was granted, and taking up his residence either in the certifying parish, or elsewhere, without an intention to return thither. 3. Abandonment.

This principle is stated so clearly by Lord Kenyon, in the last decided case upon the subject, as to reduce the point in future to a mere question of fact, to be decided by the justices upon proof of the party's intention. Abandonment defined.

(1) Rex *v.* Heath, 5 Term Rep. 583. Rex *v.* Keel, and several cases there cited, post. 166.

(2) Rex *v.* Sudbury, Burr. S. C. 373.

(3) Rex *v.* Birdham, Cald. 500.

(4) Rex *v.* Ealing, Cald. 472.

(5) Per Lord Mansfield, Rex *v.* Birdham, Cald. 500. Rex *v.* St Peter's in Derby, 1 Term Rep. 218. S. P.

In

In 1754, the pauper's father went to reside in St. Michael's, under a certificate, and continued there until 1757, when he returned to the certifying parish with his family, where the pauper was born. In two years he returned with his family to St. Michael's, and after residing there eight years, went back with them to the certifying parish. Three years afterwards he returned again to St. Michael's, where the pauper was bound apprentice to him, and having dwelt there with his family six years, he resided for another year in different parishes, and then went back with his family to St. Michael's, where the pauper resided under his indentures for a year.

Lord Kenyon, C. J.—"It was at length settled in Rex v. Newington (1), that a voluntary removal from the certified parish (not indeed for a temporary purpose only, but where, as Lord Mansfield said, "the residence there is permanently at an end") will put an end to the certificate. A mere temporary removal I understand to be, where the person goes from the certificated parish, to make a visit elsewhere, or on occasional business, *leaving his family behind him in that parish, as being the place of his domicile* (2). But in this case, the pauper's

(1) Post. 166. (2).

(2) T. M. went, in 1736, to reside in All Saints under a certificate from Darlington. While he resided there, his son Thomas was born, who, after having been hired and served for a year in a third parish, returned to All Saints, where he married, and lived until his death. His son the pauper, was born there, who, when of the age of 14, hired himself to live with B. in All Saints for three years. The grandfather T. M. returned to Darlington with his wife sometime before the pauper's service, with B., leaving his son Thomas with his family, among whom was the pauper, behind him, and both T.M. and his wife died at Darlington. Lord Kenyon, C.J. "In this case, two questions are made; 1st, whether, by the grandfather's return to Darlington, there was an end of the certificate? I am strongly inclined to think it was not an abandonment. *If all the family had indeed been removed back, that would have been an abandonment*; but as his son was left behind, it was a sort of pledge, that the certificate was not

per's father went, taking all his family with him, to the *certificating* parish, where he took a house, and resided for two years; he afterwards went back to the *certificated* parish, and again returned to the parish by which the certificate was granted, where he continued three years more, making the last parish the place of his permanent residence. On the ground therefore that he left the parish of St. Michael's (the certificated parish) not for a temporary purpose only, but with a view of making the certificating parish the place of his permanent residence, and not being able to distinguish this case from that of Rex *v.* Newington, which I wish to adopt in its fullest extent, I am of opinion, that the certificate granted to the pauper's father was discharged." (1)

It had been previously decided, that a certificate was discharged, where the object of it had returned with his family to the certifying parish, and remained there eighteen

intended to be abandoned. It is not necessary, however, to determine upon that point, because, on the other question, I am prepared to give a decisive opinion." But Mr. J. Buller, thought, "that the certificate was at an end by the grandfather's return; it was originally granted to him. The man to whom the certificate was granted, is the person whom the legislature had in view; and being granted to him according to the statute, it rightly includes his family; but his family are "those only who live with him." And as it happens in the course of time, that some of the children separate from the father, if the father himself return to the parish granting the certificate, I think that the certificate is at an end as to all of them." Rex *v.* Darlington, 4 Term Rep. 797. In this case the son had ceased to be part of his father's family, having married and become the head of a distinct one. He had also gained a settlement in a third parish by hiring and service.

A certificate to K. was granted to a father who died there, after which his son, who was named in the certificate, continued to reside in K. But his daughter, when seven years old, returned to the certifying parish, where she dwelt for eleven years, the last three or four of which were passed in service, she twice went back to her brother at K. The certificate was held not to be abandoned as to her. Lord Mansfield being at first of opinion that it was. Rex *v.* Keel, post. 167. In Rex *v.* Heath, 5 Term Rep. 583. Lord Kenyon intimates that "Lord Mansfield's first thoughts were best," see post. 166. (2)

(1) Per Lord Kenyon, C. J. Rex *v.* St. Michael's in Coventry, 5 Term Rep. 526.

teen years, when he went back to the certificated parish, to take possession of the effects of a deceased relation, and died there in six months (1); as it was also where one removed with his *whole* family into a third parish, and having remained two years, went from thence with his *whole* family into a fourth, in which he dwelt four years, and died; because, the paupers having left the certificated parish without any intention of returning, their certificates were discharged. (2)

4. Gaining a new settlement.

4th, A certificate is discharged by the party's gaining a settlement in another parish (3), although it is consolidated for the maintenance of the poor with the certificated parish. (4)

It seems, however, that this rule does not extend to acts of settlement done by minors in the parish granting the certificate. They return to the certificated parish under the certificate, if the head of the family has continued to reside there under its protection.

The pauper was born in B. where her father and mother resided under a certificate from K. After her parents' death, she lived until seven years old in B. with her brother, who was named in the certificate. She then went voluntarily to K. where she was maintained by the parish

(1) Rex *v.* Frampton upon Severn, Doug. 417.

(2) Rex *v.* Newington, 1 Term Rep. 354. Also Rex *v.* Taunton St. Mary Magdalen, Burr. S. C. 402. where the pauper returned with his whole family to the certifying parish, and died there without going back to the parish which received him under the certificate. Rex *v.* Keel, Cald. 144., seems in some degree to contradict the authority of what is here laid down. But see the opinion of Lord Kenyon, C. J. upon that case, Rex *v.* Heath, 5 Term Rep. 583.

(3) Rex *v.* Great Torrington, Burr. S. C. 428. Rex *v.* Keynsham, Ib. 429. Harrison *v.* Lewis, 3 Salk. 253.

(4) Rex *v.* Wymondham, 6 Term Rep. 552.

until

until fourteen, when she hired herself, and served two or three years in K.; after which she returned voluntarily to her brother's house at B. and was afterwards hired and served for a year in that parish. The court were of opinion, that she had not thereby acquired a settlement in B. She returned voluntarily to the house in which she had before resided with her brother, who continued to live there during the whole time she was absent. The certificate was not discharged as to him, and the circumstances do not warrant the court in saying that it was so as to her. (1)

The pauper's father went to reside in J. under a certificate from E., and the pauper, as part of his family, with him. The pauper, when sixteen years old, served three years in E. under yearly contracts, after which he returned to his father at J. where he still resided under the certificate, and in about a month hired himself to a parishioner in J. for a year, which he served. The court were of opinion that the father, residing under the certificate, his son gained no settlement in J. but was settled in E. (2)

In these cases, the hiring and service in the certificating parish had no operation. It conferred no new settlement, the pauper being settled there at the time.

Upon the same principle it has been decided that an unemancipated child follows a settlement acquired by his father, after his binding and service as an apprentice with a certificated master.

The pauper's father being settled at F., came to reside at H. upon a tenement of the annual rent of 5l. 10s.,

(1) Rex v. Keel, Cald. 144. (2) Rex v. Ingworth, 8 Term Rep. 339.

 and

and the pauper, at the age of 15, was apprenticed to S. who resided in B. under a certificate from N. with whom he regularly served his time. During the first year of his apprenticeship, the father purchased this tenement for 87l., and the pauper was clothed by his father, and occasionally visited him during the apprenticeship, at the expiration of which, being 19, he returned to his father's house in H., and receiving some new clothes, went back to his master, and worked with him by the piece for a year and a quarter. The court were of opinion that the son must be considered as having been re-incorporated in his father's family, having returned, and required and received his father's assistance, and therefore he followed his father's settlement in H. (1)

Settlement how acquired in the certificated parish.

5th, A certificate is discharged by acquiring a settlement in the parish to which it is granted. This, according to the words of 8, 9, & 10 W. III. c. 11. is to be gained only in one of two ways. 1st, Serving an office (2). 2d, Renting a tenement of 10l. a-year. (3)

May be gained by estate.

But is has been likewise held, by a very reasonable construction of this act, that one may become settled by residence on his own estate (4), in all cases where he could acquire a settlement in the parish, if unincumbered with a certificate, and that whether it is acquired by operation of law, or by his own act (5). Thus, it may be gained by residence on a freehold (6), or leasehold interest, obtained by purchase (7), or descent (8); on a copy-

(1) Rex v. Hardwick, 11 East, 578.
(2) See ante, chap. xxii.
(3) Ante, chap. xxiii.
(4) Burcleer v. East Woodhay.
(5) Rex v. Cold Ashton, Burr. S. C. 444. ante, 72. (4).
(6) Rex v. Deddington, Burr. S. C. 220.
(7) Rex v. Stansfield, Burr. S. C. 205. Rex v. Deddington, ante, 6. Ivinghoe v. Stonebridge, 1 Stra. 265.
(8) Rex v. Cold Ashton, supra, (5).

hold

hold surrendered to a wife by her father (1), or devised to her by will (2), or by the widow's quarantine. (3)

It is determined also that a settlement acquired by the head of the family in the certificated parish, will be communicated to his unemancipated children whether they are named in the certificate or not. (4)

The 9 Geo. I. extends to estates purchased for a pecuniary consideration by persons residing under a certificate so as to prevent the gaining a settlement, unless the purchase is *bona fide* of an estate of 30l. value (5). It has been doubted whether one could be obtained since that act, by any estate acquired under a voluntary grant, without a money consideration. (6)

But it was afterwards held, that a conveyance from father to son was clearly no purchase within 9 Geo. I. c. 7., notwithstanding part of the consideration was 10l. in money, and that the son's certificate was avoided by a residence of forty days after the grant of this estate. (7)

A certificate is likewise discharged by subsequent residence on an estate, conveyed to the pauper, previous to his being certificated (8), or by residence under similar circumstances, on a tenement of the annual value of 10l.

(1) Rex *v* EastWoodhay, ante, 168. (4). Rex *v* Ingleton, Burr. S. C. 562.

(2) Rex *v.* Shenston, Burr. S. C. 468. Rex *v.* Woburn, Burr. S. C. 785.

(3) Rex *v.* Long Wittenham, Cald. 474.

(4) Rex *v.* Leek Wooton, 16 East, 118. and see Rex *v.* Hardwick, 11 East, 578.

(5) Rex *v.* Dunchurch, Burr. S. C. 553, ante, 71. (2)

(6) Rex *v.* Warblington, 1 Term Rep. 241.

(7) Rex *v.* Ufton, 3 Term Rep. 251. See also Rex *v.* Ingleton, ante, (1).

(8) Rex *v.* Ufton, ut supra

taken

taken previously. For the statute which requires the taking of a tenement, does not say whether the taking shall be before or after the certificate is granted; and the principle it goes upon is the ability to take, which exists equally in either case. (1)

6. Certificate how discharged as to person expressly named.

6th, A certificate continues as to any person who is expressly named therein, until discharged by some act immediately affecting himself; for he is to be considered in the same situation as if the parish had granted a distinct certificate to him (2), and consequently his family reside under it, and are affected by it. (3)

But the settlement of an unemancipated child shifts into the certificated parish with that of the father, although it be named in the certificate.

The pauper's grandfather J. B. rented a tenement in M. being of the yearly value of 10l. at 6l. a-year. His son M. B. came to reside with him in M., and about a month afterwards the grandfather died devising his interest in the tenement to his son M. B. and making him his executor, who continued therein many years, and paid the last rent due from the grandfather J. B. as his executor. About a year afterwards, and while in possession of the tenement, M. B. applied for and obtained a certificate from the parish of W. to that of M. in which the pauper, being then about 12 years old, was expressly named, and thereby acknowledged to be legally settled in W. The court were of opinion that he followed his father's settlement acquired by residence on the tene-

(1) Rex v. Findern, Cald. 426. where the pauper had taken the tenement one month prior to his obtaining the certificate. Rex v. Leek Wooton, 16 East, 118. post. 171. (3).

(2) Rex v. Testerton. 5 Term Rep. 258. Rex v. Keel, ante, 167. (1).

(3) Rex v. Bath Easton, 8 Term Rep. 446.

ment

ment devised to him by the grandfather J. B.: "For the legislature evidently meant [in 8 & 9 W. III. c. 30. and 9 & 10 W. III. c. 11.] that the certificate should be entire to protect the *pater familias* and the family whether named or not; and this naming of any of the family is a mere matter of convenience, the more easily to identify them, but is not directed to be done by the legislature, nor are any powers taken away from or given to such children on account of their being named or not named in the certificate. It is mere artificial reasoning which makes a distinction between such of the children as are and such as are not named in the certificate; a distinction which the act itself does not make." (1) "The language of Lord Mansfield is founded in reason, and not opposed by the act, that the children of all parents must have the settlement of their father until they acquire another for themselves, and that therefore the pauper in this case continuing part of the father's family at the time, derived the settlement from him, and was not repelled from it by the circumstance of being named in the certificate (2)." If such were not the true construction of the act, the inconvenience would follow, that however young the children might be coming with their father into the parish with a certificate naming them, if the father gained a new settlement there, he would be settled in one parish and the children in another. (3)

(1) *Verba* Lord Ellenborough, C. J. Yet *quære* whether the expressly naming persons in a certificate, who would otherwise be included under the general denomination of family, may not have been intended in many instances to save the trouble of granting other certificates, and extend its protection to such children after they cease to be part of their father's family, without affecting their condition while they continue members of it; as for instance, in case of the father's death, or the certificates being abandoned by him. See the opinion of Le Blanc, J. 16 East, 124.

(2) Eod. Jud.

(3) Per Bayley, J. Ibid. Rex v. Leek Wootton, 16 East, 118.

7th,

7. When by emancipation.

7th, It is discharged as to those who reside under the general description of part of the family, by their ceasing to be so from becoming emancipated. (1)

Not determined by his death to whom originally granted.

But a certificate is not determined in all cases as to those who have resided as members of the family, by the death of the person to whom it was originally granted. A man and his wife came into a parish under a certificate; the woman dying, the husband married again, and the second wife was held to reside under its protection after her husband's death (2). A pauper born in the parish, where his father resided under a certificate, was put out apprentice there; his father died six months before the expiration of his apprenticeship, yet the certificate was not considered as determined by the death, so as to enable the apprentice to acquire a settlement, for he came into the parish, and resided under its protection. (3)

If a certificate is discharged by any of these means, all who reside under it, whether as natural parts of the family, as apprentices, or as servants, are restored to their capacity of acquiring settlements in the parish as if it never had existed.

Must shew it discharged.

It is necessary for those who wish to get rid of a certificate, to shew some matter in discharge of it. As if they rely upon a subsequent settlement by estate, under a voluntary grant, the *onus probandi* is on them, that the grant is voluntary; it does not lie on the other side to prove it a grant, for a valuable consideration: whoever wants to set aside that which has once existed, must shew something which destroys it. (4)

(1) Rex v. Darlington, ante, 48. Rex v. Bugden, Burr. S. C. 270. ante, vol. i. 229. Rex v. Heath, ante, 163. (1). Rex v. Hampton, ante, 156. (3). Rex v. Mortlake, 6 East, 297.

(2) Rex v. Hampton, ante, (1). Buller, J. dissent.

(3) Rex v. Alfreton, 7 Term Rep. 471. and see Rex v. Keel, ante, 167. (1).

(4) Per Ashhurst and Buller, J. Rex v. Warblington, 1 Term Rep. 241.

But where the pauper's grandfather came into S. under a certificate in 1727, and the pauper was relieved by S. while resident in other parishes; he was considered as settled there, although no other evidence was given of his father or grandfather having gained a settlement since the certificate. For there was ample time for the father's being emancipated as well as the pauper, and there was no reason why S. should have relieved the pauper while residing in other parishes, if they had not known that he was settled with them. (1)

Presumed discharged after 70 years, by relief.

SECT. VI.

Of reimbursing the certificated Parish.

As persons coming into a parish with a certificate are enabled to reside there without being removed until actually chargeable, it was reasonable that the parish thus compelled to receive the probable poor of other places, should be exonerated from the burthens incident to such residence as soon as they became unable to support themselves. This has been provided for by 3 *Geo.* II. *c.* 29. *s.* 9. which enacts that "When any overseer or other person shall remove back any person or their families, residing under a certificate, and becoming chargeable to the parish or place to which they shall belong; such overseers or other person shall be reimbursed such reasonable charges as they may have been put unto in maintaining and removing such persons, by the churchwardens or overseers of the place to which such persons

3 Geo. II. c. 29.

(1) Rex *v.* Stanley cum Wrenthorpe, East. 52 Geo III 15 East, 389

are

are removed; the said charges being first ascertained and allowed by one or more justices for the county or place to which such removal shall be made; which said charges so ascertained and allowed shall in case of a refusal of payment, be levied by distress and sale of the goods of the churchwardens and overseers of the place to which such certificate person is removed by warrant of such justice or justices."

PART III. SECT I.

Of 35 *Geo.* III. *c.* 101.

35 Geo. III. c. 101. confines it to persons actually chargeable.

Besides the general regulations introduced by 8 & 9 W. III. c. 31. and 9 & 10 W. III. c. 3. respecting certificated persons, the legislature extended the privilege of irremovability to various trades, callings; and descriptions of persons by partial statutes. But it is unnecessary to notice these particular enactments (1), the general

(1) Mariners and soldiers exercising a trade, 22 Geo. III. c. 44. Gate-keepers or persons renting turnpike tolls, and residing in the toll-house, 13 Geo. III. c. 84. s. 56. Officers, mariners, soldiers, and marines, serving since 1763, and their wives and children, 24 Geo. III. c. 3. Officers and soldiers in the militia, drawn by ballot, or any of the fencible regiments, 24 Geo. 3. c. 6. s. 4. Married militia men serving, when drawn out into actual service, 26 Geo. III. c. 107. s. 131. Their wives and families, 43 Geo. III. c. 47. s. 8. Certificated members of benefit societies, 33 Geo. III. c. 54. s. 17. It has been decided, that 22 Geo. III. c. 44. and 26 Geo. III. c. 107., were made *in pari materia*, and extend only to such mariners, soldiers, and married militia-men, as are traders, and not to husbandmen. Rex *v.* Gwenop, 3 Term Rep. 133. 2 Bott, 542. Pl. 544. Persons having served apprenticeship to the trade of a woolcomber, or otherwise intitled to exercise it, may set up that or any other trade for which they are able, without being removable, 35 Geo. III. c. 124. In order to prevent the settlement of an apprentice bound to a master residing under a certificate from a friendly society by 33 Geo. III. c. 54. it is not enough for the certificated parish merely to produce the certificate upon hearing

ral law 35 Geo. III. c. 101. (1), having rendered all persons irremovable until they become actually chargeable to the parish or place which they inhabit (2), except, 1st, persons convicted of larceny or other felony; 2d, rogues, vagabonds, idle or disorderly persons, and such as shall appear upon the oath of one or more credible witness to be persons of evil fame, or reputed thieves, and not able to give a satisfactory account of themselves and their way of living (3); 3d, unmarried women with child shall be taken, and deemed actually chargeable, &c. (4)

Except, 1. Persons convict of felony

2. Rogues and vagabonds.

3. Pregnant unmarried women.

No case has occurred which defines the import of the terms "becoming actually *chargeable*," as used in the first section of this act. But the phrase seems to retain the meaning it had previously acquired in settlement-law, viz. becoming a burthen to the parish by the actual receipt of relief.

Meaning of "actually chargeable," in 35 G. III c. 101.

The statute was designed to give a more general effect to those provisions in 9 & 10 W. III. c. 11. which enabled poor persons to quit their places of settlement for the purpose of a livelihood, and, at the same time, to remove the inconveniences which arose from granting certificates. The decisions, therefore, upon the act of William, may be considered as applicable to the 35 Geo. III. 101. being made *in pari materia*.

Same as in 9 & 10 W. III. c. 11. in the *pari materia*.

1st, It has been determined upon the certificate act, that none but those who are become actually chargeable to the parish can be removed from it.

Under 9 & 10 W. III c. 11. none removable but those actually chargeable.

hearing the appeal against an order removing the apprentice there; but they must likewise shew that such certificate had been delivered to the parish officers as mentioned in sect. xvii. of he act before the service of the apprentice. Rex *v.* Egremont, 14 East, 253.

(1) See Appendix.

(2) Sect. 1.

(3) Sect. 5.

(4) Sect. 6.

A grand-

If A. and his family not residents with his father ask relief, the latter is not thereby chargeable.

A grandfather resided with his family under a certificate. He had a son who married, and took a house in the same parish, and resided apart from his father. The son, and his child (after the son's death), had asked and obtained relief with the grandfather's knowledge; but neither the grandfather, *nor any of his family residing with him*, asked or obtained relief, or became personally chargeable to the parish. Lord Kenyon, C. J.—"The single question is, whether the persons who have been removed can, in the fair sense of the words, be said to be actually chargeable to the parish? Now it is negatived by the case that any of those persons received relief in person. But it is contended, that they were virtually relieved, because the son and the grandson both received relief. But it must be observed, that at that time they were not members of the family of the *pater familias* now removed; they lived apart from him, and formed another family of themselves. Then it has been said, that a burthen has been thrown upon the parish by the relief of the son and grandson, and therefore that the grandfather was virtually chargeable, because the 43 Eliz. requires fathers and grandfathers to support their children and grandchildren. But that proposition hastens to a conclusion too soon: for by that statute they are not, at all events, to maintain their grandchildren, &c. but only where they are of sufficient ability. Now the justices are the proper judges of that ability; and the grandfathers, &c. are only to be called upon by an order of justices." (1)

Further, it is not a sufficient ground for the removal of a certificated person, that their unmarried daughter, though residing in the house, is with child. For *non constat* that it will be born a bastard, and though

(1) Rex *v.* St. Mary Westport, 3 Term Rep. 44.

probable,

probable, it is not certain that any burthen will fall on the parish, for she may be married before she is brought to bed. (1)

Also, where a man residing with his family, under a certificate, had a daughter living with him of the age of eighteen, who being pregnant of a child, afterwards born a bastard, asked relief for herself only: Aston, J. said, "that he was inclined to be of opinion, that if several persons resided in a parish under the same certificate, the asking relief by a single one of them would not render the rest removable." (2) Unmarried daughter aged 18, with child, asks relief; father not chargeable. Semble.

2d, The party must become an actual charge and burthen to the parish, by receiving relief out of the poor's fund. The asking relief from a parish officer, without receiving it, does not render him chargeable (3). Neither does the actual receipt of relief from an inhabitant, who is not an officer. (4) 2. Party must receive relief *from an officer*.

It has been decided, that 35 Geo. III. c. 101. s. 6. which enacts, that unmarried women with child shall be 35 Geo. III. c. 101. extends to

(1) Per Lord Kenyon, C. J. Ibid.

(2) Rex *v.* Framlingham, Burr. S.C. 748. 2 Bott, 539. Pl. 552. There seems to be but one direct determination, as to how far the head of a family becomes chargeable, and therefore removable by any of its subordinate members becoming so. It is laid down in Waltham *v.* Sparks, Skin. 566. Comb. 321., that a father who is by nature bound to maintain his children, being unable to do so, is in that respect impotent and chargeable to the parish. Different questions might be made respecting different members of a family: 1st, The wife; 2d, Unemancipated children living with the parent, and able to work for their support; 3d, Unemancipated children disabled from labour by sickness or infancy; 4th, Apprentices unwilling to dissolve their indentures. 5th, The case of emancipated children seems directly considered by Lord Kenyon in Rex *v.* St. Mary Westport, ante, 176. See Jane Carr's case, Rex *v.* Overseers of St. Mary in Carlisle, Cald. 76.

(3) Rex *v.* Kingswood, Burr. S. C. 392.

(4) Ib. and see Great Bedwin *v.* Wilcot, Burr. S. C. 163. post. 194 (2).

 deemed

pregnant single women, residing under certificates.

deemed actually chargeable, and may be removed as such, extends to those who reside under a certificate. For although a woman in this condition was not removable under 9 & 10 W. III. c. 11. solely on that account as one actually chargeable to the parish (1), yet the words of 35 Geo. III. are sufficiently comprehensive to include her, and there is no reason to narrow the construction, so as to prevent its extending to a case that wanted a remedy. (2)

Also to a married one.

It has been likewise held that a married woman who in the absence of her husband abroad, is pregnant under such circumstances as that the child would be deemed by law a bastard, is liable to be removed under the 35 Geo. III. though the words of the act are "every "*unmarried* woman with child." For "the legislature "plainly had in view that every woman pregnant of a "child which was not protected by the matrimony of "the parents, but would when born be a bastard, should "be removable, whether married or unmarried: for "though the mother were married, yet if her child "would by law be a bastard, she was in *pari jure* "within the scope of this act with an unmarried woman "who was pregnant." (3)

Object of 35 Geo. III. only to prevent removal of persons likely to become chargeable, until actually so.

The meaning of 35 Geo. III. c. 101. was to prevent the removal of persons until actually chargeable, who were before removable if likely to become so; but not to make persons removable who were not proper objects of removal before that act (4). Thus a single woman who is pregnant, and a person of substance, cannot

(1) See Rex *v.* St. Mary Westport, ante, 176.

(2) Rex *v.* Great Yarmouth, 8 Term Rep. 68.

(3) Rex *v.* Tibbenham, 9 East, 388.

(4) Per Lord Ellenborough, C. J. Rex *v.* Alveley, 3 East, 563.

be

be removed (1). It was held, also, that a single woman who was with child, and lived in service, could not be removed against her own or her master's consent, as one actually chargeable under this act. For the mere circumstances of a single woman's being with child, did not before the act operate as a dissolution of the contract of service, and make her liable to be removed, against the consent both of the master and servant. (2)

Does not impower the removal of a single woman of substance, if pregnant; nor a pregnant servant maid against her master's consent.

And in a subsequent case the court adhered to this opinion; that being pregnant with a child which if born would be illegitimate, amounts to no more than presumptive chargeability, so as to put it on the party disputing that fact, to shew that she is a person of substance, or as in Rex *v.* Alveley, that she is under a contract of hiring and service with another at the time, so as to rebut the presumption of being actually chargeable to the parish, and consequently liable to be removed. (3)

(1) Per Lawrence, J. ib. Per Lord Ellenborough, C. J. Ibid. and Rex *v.* Tibbenham, ante, (5).

(2) Decided, ib. and see ante, Vol i. 388. n. (1).

(3) Rex *v.* Tibbenham, Ibid.

CHAPTER XXIX.

Of removing the Poor.

Poor how removed.

AS soon as parish officers have ascertained what poor they are empowered to remove, when they become an actual burthen to the parish, their next duty is to adopt proper measures for their removal.

Three modes.

The modes of removal are three; 1st, by an order of removal under 13 & 14 Car. II. chap. 12. to the place of their last legal settlement. 2d, The removal of vagrants by a pass. 3d, By a power said to be vested in the justices to remove in some particular cases, not specifically provided for by statute.

SECT. I.

Of Orders of Removal.

Application to remove.

Parish officers' complaint.

WHEN a person becomes chargeable to the parish, its officers (for none else can do it) (1) should apply to the magistrates for an order to remove him. The complaint may be laid before a single justice (2). It is the foundation of the magistrates' jurisdiction (3), and need not be upon oath. (4)

(1) Per Holt, C. J. Weston Rivers v. St. Peter's, 2 Salk. 492.

(2) Rex v. Westwood, 1 Str. 73. Rex v. Stanstead, 2 Salk. 488.

(3) Rex v. Harely, Andr. 361. Weston Rivers v. St. Peter's, 2 Salk. 492. ante, (1).

(4) Rex v. Standish, Burr. S. C. 150. Rex v. Southwold, ib. 140.

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The pauper ought to have notice of this complaint, and be heard (where it can be done) before his removal (1); for the court will grant an information against magistrates making an order, if they have omitted to summon him through wilful neglect. (2) Notice to pauper.

The head of the family should be examined when it can be done conveniently, but it is sometimes unnecessary and impossible. As if he be insane (3), or cannot be found (4); so an infant of tender years cannot be examined (5). But, to warrant the removal, it is by no means necessary that the evidence should be in all respects complete and conclusive of the settlement. If it be legal in its nature, and such as affords a fair presumption of the party's settlement, that is sufficient, when uncontradicted. It is enough, therefore, when the head of the family has absconded, or the paupers are incapable of giving evidence, to summon some relation, or other person, acquainted with the settlement of those who are to be removed. Thus, where the father of children under seven years old has absconded, the examination of the grandmother will be sufficient to found an order of removal (6). So an adjudication of the settlement of husband and wife may be made upon When unnecessary.

(1) Anon. Comb. 478. 2 Bott, 637. Pl. 666. Per Buller, J. Rex *v.* Bagworth, Cald. 179. 2 Bott, 640. Pl. 674.

(2) Rex *v.* Wykes, 2 Str. 1092. Andr. 238. 2 Bott, 638. Pl. 670.

(3) See Rex *v.* Eriswell, 3 Term Rep. 707.; ante, Vol. i. 444. (2).

(4) See Rex *v.* Stone, 6 Term Rep. 56. 2 Bott, 27. Pl. 49. Rex *v.* Binegar, 7 East, 377.

(5) Per Buller, J. Rex *v.* Bagworth, ante, (5). Rex *v.* Everdon, 9 East, 101.

(6) Rex *v.* Bucklebury, 1 Term Rep. 164. But the justices seem to have no power to compel their appearance, if they think proper to disobey the summons.

the examination of the wife only (1); and that although it does not appear that the removing parish has used due diligence to find the husband. (2)

Magistrates summons.

The next proceeding, after information by the parish officers, is, that the magistrate grant a summons requiring the party to appear before *two* justices: for although the complaint of a pauper's settlement may be to one justice, the examination ought to be by those two who sign the order. (3)

Warrant if pauper refuses to appear.

If upon service of this summons the pauper refuse to come, a warrant may be granted to bring him before two justices, who are to examine and remove. (4)

Order must be made by oral testimony on oath

Order made upon an affidavit, taken before other justices, bad.

The justices, who made the order, must have proceeded formerly in all cases upon *viva voce* testimony, taken before themselves in each other's presence (5), by examination upon oath. An order made by two justices of one county upon an examination taken before two of another, and transmitted to the former with an affidavit, verifying that it was duly taken, was held bad, the person examined

(1) The wife only was removed. It was objected, that the order was illegal on this account, as the wife could only know the fact of her husband's settlement by hearsay. But by Lord Ellenborough, C. J. this does not follow; she may know the fact as well as any other witness. Rex *v.* Binegar, ante, 181. (4).

(2) Rex *v.* Stone, ante, 181. (4). In that case the pauper's father was examined on the appeal.

(3) Rex *v.* Wykes, 2 Str. 1092. ante, 187. (2). Rex *v.* Howarth, 2 Bott, 640. Pl. 673. It is stated in this last case, that in Rex *v.* Wykes, an information was granted against three justices for making an order, three having signed it, and only one having examined the party.

(4) Per Gould, J. Ware *v.* Stanstead, 2 Salk. 488.

(5) Rex *v.* Howarth, 2 Bott, 640. Pl. 673. But see Rex *v.* Everdon, 9 East, 101. and 49 Geo. III. c. 124. next page.

being still alive (1). Yet it seems as if it might be used as concurring evidence. (2)

49 G. III. c. 124.

But it is now provided, by 49 G. 3. c. 124. s. 4. That whenever it shall happen that any pauper is by age, illness, or infirmity, unable to be brought up to the petty sessions to be examined as to his or her settlement, it shall be lawful for any one magistrate acting for the district, where such pauper shall be, to take the examination of the said pauper, and report the same, to any other magistrate or magistrates acting for the said district, and for the said magistrates, upon such report, to adjudge the settlement of the said pauper, to all intents and purposes as if the said pauper had appeared before two magistrates."

Commitment, if pauper refuse to answer.

If, when the pauper is examined, he refuses to answer proper questions put to him in the course of his examination, the justices may commit him "until he shall answer." For as they have a right to examine him touching his settlement, it would only be a shadow of a right, unless they have a power likewise of enforcing that examination by committing the pauper for refusing to be examined (3). The form of such commitment ought to be "until he shall answer," &c. For it is like the case of a commitment by the commissioners of a bankrupt, where the party committed must send word when he will submit, and answer the questions. (4)

Form of commitment.

Order when to be made.

If the justices are satisfied upon the pauper's examination, and such other evidence as is adduced before them,

(1) Rex v. Coln St. Alwin, Burr. S. C. 136.

(2) Per Lee, C. J. Ib. and see Rex v. Long Critchell, post. 187. (4).

(3) Per Ashhurst and Buller, Js. Rex v. Jackson, 1 Term Rep. 653. But the Court came to no decided opinion.

(4) Per Buller, J. ib. and see Mayor of Northampton's case, Carth. 152. post. chap. xxxv. sect 3.

 that

that he has intruded into the parish, and is become chargeable there, being legally settled in some other place, they ought to make an order for his removal thither.

An order of removal is usually under hand and seal. This seems necessary, as it is called "a warrant to remove," in 13 & 14 Car. II. c. 12. and 3 W. & M. c. 11., and the better opinion seems to be, that all warrants should be thus executed. (1)

Dated. It is likewise usual and proper to specify the day upon which the order is signed. But this omission does not vitiate it, unless some damage is proved to result from the neglect. An order of removal purported to be executed thus: "given under our hands and seals, the day of April, in the year of our Lord 1804:" upon appeal, the sessions were of opinion, that the day of the date being left in blank, rendered the order defective; and that they had no power to amend it, or receive evidence of its date, or of the time of the removal: and they quashed the order. But the court of king's bench quashed their order, and confirmed that made by the two justices. (2)

How made. As an order is a judicial act, requiring the magistrates mutual concurrence, it must be determined upon while they are together, and should be signed by them in each other's presence (3). But if an alteration is made in it by one magistrate in the other's presence, after it is signed

(1) 1 Hal. H. P. C. 577. 3 Hawk. book 2. chap. 13. p. 181. Ed 7. 2 Inst. 591. Dalt. Just. Peace, chap. 169. p. 579. Ed. 1727. See also Rex v. Woodsterton, post. (4).

(2) Rex v. Brimpton, Hil. 45 Geo. III.

(3) Rex v. Howarth, 2 Bott, 640. Pl. 673. But in this case, one justice signed the name of another who was not present at the examination; and that it may be sufficient if they agree upon the order together, although they sign when separated, see ante, Vol. i. 50. n. (7).

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by both, and before delivery to the parish officers, although without being re-sealed and re-delivered, the order is not therefore bad.(1)

When only voidable.

Even if it be signed by two magistrates away from each other, while one of them is out of his jurisdiction, it renders the order only voidable upon appeal, and not absolutely void.(2)

General rules respecting orders.

Before observing upon the technical parts of this kind of orders, it may be necessary to premise some general rules respecting them.

1st, Only one family removed by an order.

1st, The justices cannot remove more than one family, by one order. Because, not only the parishes, but the parties have a right to appeal: and as between parishes, 8 & 9 W. III. c. 30. gives costs to the parish in whose favour the appeal is determined; and now the appeal would be determined in favour of neither and of both: it cannot be said the order is reversed, because it stands good as to part, and cannot be said to be confirmed, because it is not held good as to the whole; and further, the party might chuse to appeal, which would draw over the other matter, in which the parties on all sides acquiesce.(3)

(1) Rex *v.* Llanwinio, 4 Term Rep. 473.

(2) Rex *v.* Stotfold, 4 Term Rep. 596. ante, 129. (1). But see Rex *v.* Hamstate Redware, 3 Term Rep. 380. ante, Vol. i. 456. (1).

(3) Per Eyre and Fortescue, Js. Pratt, C. J. hæsitante. Chewton *v.* Compton Martin, 1 Str. 471. This seems clear where the removal is to different parishes. But different parts of the same family may have different settlements, and it is daily practice to affirm an order in part and quash it as to the remainder. In Wangford *v.* Brandon, Carth. 449. one order removed three poor men and their families, and this objection was not taken, although several others were made to its form. See also Anon. 2 Salk. 482. which seems S. C. But in Comb. 478. which seems also to be a report of the same case, it is expressly observed, "that justices may "make one order to remove several "families, and upon appeal to sessions they may reverse it quoad "one."

2d,

2d, It must not be conditional.

2d, They cannot make it provisionally, as "to continue till the next sessions (1);" or "except the party find security to be allowed by them," *i. e.* the justices, for they cannot make a conditional order; it is an adjudication, and ought to be absolute: they have nothing to do with the security. (2)

3d, Must be to a place maintaining its poor.

3d, They have no authority to remove, except to a parish or district having officers, and maintaining its own poor. They cannot remove to an extra parochial place not having overseers (3), nor to an hamlet within a parish, if in the same situation, although it does not contribute to the relief of the poor of the parish (4), nor to a large and populous district, part of a parish, maintaining its poor in common therewith, and without any separate establishment of its own. (5)

4th, Where parish has officers for one district, and not for another.

4th, But where a parish lay in the counties L. and W. and an overseer was appointed for that part which lies in W. and never had been for that in L., but the same overseer usually acted in the maintenance of the poor throughout the whole parish, it was held, that a removal might be made to that part of the parish lying in L. where the pauper had gained a settlement by hiring and service, and that she might be delivered to the officer appointed for W. For the part in L. cannot be considered as extraparochial and without overseers, the churchwardens being overseers to this purpose (6). But if the divisions of a parish thus situated have distinct officers and rates, and make distinct accounts, then each division is to be consi-

(1) Braitar *v.* Usley, Cas. Sett. & Rem. 53.

(2) Oakham *v.* Whittlesea, 11 Mod. 171.

(3) Ante, 143.

(4) Rex *v.* Tamworth, Cald. 28. ante, 143.

(5) Rex *v.* Swalcliffe, Cald. 248.

(6) Rex *v.* Mereval, Burr. S. C. 661.

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dered as a several parish, and the removal must be to that district in which the settlement is gained. (1)

5th, Not two orders.

5th, Two justices cannot make an order removing the same parties while an appeal against a prior order is pending at sessions. (2)

6th, Not subsidiary.

6th, The order must be original, and not subsidiary to another, *i. e.* it cannot be made by way of executing a prior order of removal. A man is removed from the parish of A. to the parish of L. He goes from L. to P. who got several orders from two justices, by way of execution of the first order, to remove him from P. to L. But all of them were quashed, because P. ought to have made an original complaint, and upon that have got an order, and not have grafted upon the order of removal from A. to L. though they might have used that as evidence (3), to induce the justices to make such original order. (4)

7th, May supersede order obtained by surprise.

7th, If the justices have made their order by surprise, they may issue another, reciting that they were surprised, and suspending the first order, and commanding the parish officers to return it to be cancelled; for this prevents the charge of an appeal. (5)

8th, A parish in whose favour an order is made, may, after it is executed by the pauper's removal, determine to

(1) Anon. Sir T. Raym. 476.

(2) Rex *v.* Hedingham Sible, Burr. S. C. 112.

(3) See Rex *v.* Coln St. Alwin, ante, 183.

(4) Rex *v.* Long Critchell, 2 Salk. 489.

(5) Pancras *v.* Rumbold, 2 Bott, 624. Pl. 638. In this case, the supersedeas issued three days after the order, and it appears, from the form of the supersedeas and what is said by the court, to have issued before the order was served, or at least before an appeal was lodged against it, or the time for appealing expired. See Rex *v.* Smith, 2. Bulst. 343.

abandon

abandon it without waiting to have it quashed upon appeal, if they find upon further information that it cannot be supported; for there can be no objection to a party's abandoning a judgment intended for his own benefit. And where such an order is cancelled by the justices who signed it before the time for appealing, with the consent both of the removing parish and that removed to, a subsequent order of removal to a third parish is good. (1)

SECT. II.

Of the Form of an original Order of Removal.

Form of an original order.

An order of removal is in effect likewise an order of maintenance; for it not only directs the party to be removed to the place of his settlement, but also that he shall be received and provided for there. Such an order may be either original, *i. e.* the first made to remove the persons mentioned, to the place thereby adjudged to be their settlement, or it may be to remove them again, either to or from thence. This distinction must be noticed, as something additional is necessary to the form of the order in this latter case.

Two kinds.

The following particulars are essential to the validity of an original order of removal. 1st, It must set forth the

(1) Rex *v.* Llanrhydd, Burr. S. C. 658. ante, 128. Rex *v.* Diddlebury, 12 East, 319. S. P. In this last case, Chalbury *v.* Chipping Farringdon, 2 Salk, 488. was cited to shew that an order after execution being in the nature of a judgment executed, could only be reversed by appeal. But it was observed, that in that case there was no consent of the party in whose favour the order was made to vacate it.

the authority of those who take upon themselves to make it. 2d, The complaint of the parish officers, which is the foundation of the order. 3d, The justice's examination or inquiry into the truth of the complaint. 4th, A description sufficiently certain of the parties. 5th, An adjudication, or judgment upon the truth of the complaint, and of the pauper's settlement. 6th, It must require the parish officers of the complaining parish to remove, and those of the parish in which the settlement is adjudged to be, to receive and provide for the pauper. (1)

I. *Of setting forth the justice's authority.*

It ought expressly to appear, that the magistrates have jurisdiction to make the order. It should profess, therefore, to be made by two justices of the peace. An order stating only, "whereas complaint has been made unto us," without reciting their authority (*i. e.* that they were justices of the peace), was quashed as bad; and although in an appeal from the order (2) they were mentioned to be justices, yet that will not help, for they might be justices then, and not at the making of the order. (3)

Justice's jurisdiction must appear by two justices.

It must appear likewise, that they are justices of the county in which the place from whence the paupers are to be removed is situate; for by 13 & 14 Car. II. c. 12. the jurisdiction is given to the justices of the county where the pauper comes to inhabit. Thus, where no county was mentioned in the margin of the order, and it was directed to the churchwardens and overseers of S. in the county of Middlesex, and to those of C. in Buckingham-

Of the county from whence removal made. How to be set forth.

(1) See the form of the Order, Burn's Just. tit. Poor Removal. The order is directed to the parish officers of the removing and those of the receiving parish.

(2) i. e. Ut videtur, in the order of sessions, which, upon appeal, confirmed that of the justices; or possibly in the appellant's notice of appeal.

(3) Walton v. Chesterfield, 5 Mod. 322.

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shire, and the magistrates only styled themselves in the body of the order, justices of the peace "*for the county aforesaid,*" it was quashed. For as two counties were previously mentioned, it is doubtful of which they are magistrates; whereas it should appear, that they were justices of B. where the parish is situate, from whence the removal was made (1). Although a county is mentioned in the margin, it does not help the defect, if two counties are mentioned in the body of the order, notwithstanding they describe themselves to be justices, "in and for the said county," for these words have no necessary reference to that county in the margin (2). But where no county is mentioned in the body of the order, and there is one in the margin, that will do; for the margin is to be considered as part of the order, and a plain clear reference to it is sufficient (3). It is said not to be sufficient that they are stated to be "justices of the county," omitting the words "of the peace (4)." And if it only state them to be "justices *in* the county," and not *of* or *for it*, the exception is fatal (5); for they may be magistrates residing in the county, and not in the commission there. If it mention, however, the county by its com-

County mentioned in margin, and two in body of order.

If only one.

(1) Rex *v.* Stepney, Burr. S. C. 23. Rex *v.* Chilvers Coton, 8 Term Rep. 178. S. P.

(2) Rex *v.* Moor Critchell, 2 East, 66. The order set forth, "whereas complaint has been made to us by you the churchwardens, &c. of D. in the *county of Wilts* aforesaid," [that from whence the pauper was removed] "unto us, whose hands and seals are hereunto subscribed and set, being two of His Majesty's justices of the peace in and for the said county, &c. It was argued, that the words "justices of the peace, in and for the said county," must have reference to the county in the margin, which is Wilts. 2dly, It has reference, in grammatical construction, to the last antecedent, which is also Wilts. But the Court quashed the order. It was further determined that the sessions had no power to amend this defect under 5 Geo. II. c. 19. ib. See also Great Bedwin *v.* Wilcot, 2 Str. 1158.

(3) Rex *v.* Bourne, Burr. S. C. 43. Rex. *v* Ufculm, ib. 138. Rex *v.* Holbeck in Leeds, Burr. S. C. 198.

(4) Rex *v.* Upton, Cas. Sett. and Rem. 27.

(5) Rex *v.* Owlton, 2 Salk. 474. Rex *v.* Dobbyn, 2 Salk. 474. S. P.

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mon, instead of its proper legal appellation, as if Shropshire is put instead of Salop, that is sufficient (1); and the court will take notice of the divisions of a county. Thus, where (Lincoln, Holland) was inserted in the margin of an order, it was understood to mean, that Lincoln is the county, and Holland the division. (2)

When magistrates state themselves "justices for the borough, *or* town and parish of A." it is not bad, for both town and borough are coupled with the parish for which the order is made; and they sufficiently appear to be justices of either of those places for which they were empowered to make this order. (3)

It must appear also, that one of them is of the quorum (4), but it need not state they are of the division whence the removal is to be made. (5) Of the quorum.

Upon the same principle that the order must shew that the justices are magistrates of the county, it must likewise appear, that the parish from which the pauper is to be removed, is situate in that county of which they state themselves justices. An order had Gloucester in the margin, but did not, in the recital, say that Dunsborns Abbots (the parish from whence the pauper was removed) is in the county of Gloucester, or in the county aforesaid, and was quashed for this defect. Must state the parish whence removed, to be in the county.

(1) Rex *v.* Madeley, Burr. S. C. 202.

(2) Rex *v.* Bourne, ante, 190. (3).

(3) Rex *v.* Andover, Cald. 373.

(4) Anon. 2 Salk. 473. Chittamton *v.* Benhurst, 2 Salk. 473. Albrighton *v* Skipton, 1 Str. 300. But see 26 Geo. II. c. 27. and 7 Geo. III. c. 21.

(5) Anon. 2 Salk. 473. ante, (4). Eliz. Ashley's case, ib. 480. Vol. i. 49. n. (9).

II. *Of*

II. *Of stating the Complaint.*

No one can disturb a man coming into a parish, but those parochial officers who have authority to do so. (1)

Must state complaint.

The order therefore must state, that it is made "upon complaint of the churchwardens, &c." that being the foundation of the justice's jurisdiction (2). If it profess to be made upon hearing the different allegations and proofs, that is not tantamount. (3)

But if it be directed to the officers of the two parishes, and state "the complaint to be made by you," without saying which, this is sufficient, for it must necessarily be intended to be made by the parish aggrieved by the residence; because if both complain, it must be upon complaint of the right parish.(4)

Complaint must set forth,

This complaint should expressly set forth two things:

1st, That party is come to inhabit.

1st, That the parties who are sought to be removed, are come to inhabit in the parish or township to which the officers belong, not having gained a legal settlement there.

2d, Is chargeable.

2d, That they are actually chargeable to the said parish or township.

(1) Per Holt, C. J. Weston Rivers *v.* St. Peter's, 2 Salk. 492. ante, 180.

(2) Weston Rivers *v.* St. Peter's, 2 Salk. 492. Rex *v.* Harely, Andr. 361. ante, 180. (3). Great Bedwin *v.* Wilcot, 2 Str. 1138.

(3) Shackford *v.* Northbovey, Sett. and Rem. 33.

(4) Spalding *v.* St. John Baptist, Fol. 267. Horsham *v.* Hendfield, Burr. S. C. 24. See also Rex *v.* Kidderminster, 11 Mod. 265.

1st,

1st, In one case, an order stating that the pauper and his wife do "endeavour to intrude into the parish," &c. was quashed, because an endeavour to come in does not import that he actually was come in (1). But in a subsequent case, where the order ran, "whereas J. C. and his wife *is come* into your parish, endeavouring to settle themselves contrary to law, and are likely to become chargeable," &c. *Per* Pratt, C. J. — "I do not think it necessary to shew they came in, but only an endeavour to settle; and that may be where the party never came in, as the case of children born in one parish, when the settlement of the parent is in another. But if it was necessary, it is implicitly set forth, which, in the complaint, is sufficient." (2)

1st, As to coming to inhabit, "Endeavour to intrude," had. If implicitly set forth, sufficient.

So where an order stated that the paupers "lately came, and intruded themselves into the said parish," it was objected that it did not appear that the paupers were *then* in the parish, *i. e.* at the time of the removal. But it was answered, that the order states, and the magistrates adjudge it to be true, that the paupers *are likely to become chargeable* to the parish, which could not be if they were not in the parish at the time. (3)

But as the complaint is the foundation of the jurisdiction, the justices cannot remove more than are complained of. An order, stating, "whereas J. S. had intruded into the parish of A., *and is* likely to become chargeable; these then are to remove him, *with three children*," was quashed for this defect. (4)

Justices can remove no more than are complained of.

(1) Rex *v.* Gresham, Sett and Rem. 16. Although the order proceeded to state "that he is likely to become chargeable," as to which, see Rex *v.* Binegar, post (3).

(2) Rex *v.* South Marston, 1 Str. 189. But see the effect of 35 Geo. III. post. 198.

(3) Rex *v.* Binegar, 7 East, 377.

(4) Rex *v.* Nedington, Sett. and Rem. 45.

Complaint that father chargeable, when a ground for removing his family.

Yet this is well enough, if it appears that the father's becoming chargeable is a good ground for removing those of his family named in the order. An order, adjudging the husband settled at K., and that *he* was likely to become chargeable to H., and sending him, his wife, and son *of one year old*, to K. was held good. (1)

2d, Must state pauper actually chargeable, as in case of certificate.

2d, Since 35 Geo. III. c. 101. the complaint should state that the paupers are become actually chargeable, as it must have done previously where persons resided under a certificate. (2)

Single woman pregnant.

Thus, where the order stated that E.M. single woman *is with child and unmarried*, and that the justices do adjudge the same to be true, it was held ill; for if it were an irrefragable conclusion that being a single woman and with child, the party removed must be deemed chargeable within the meaning of the statute, the order would be good; otherwise the justices ought to have drawn the conclusion to shew that in their judgment she was a proper object of removal within the poor laws: for though a person, unmarried and with child, is presumptively chargeable from the strong probability that she must be so, yet as there may be circumstances such as the substance of the party, or the giving a complete indemnity to the parish, which may exclude that presumption; it ought to appear by the order that the justices had exercised their judgment, and repelled the existence of such circumstances, by their adjudication

(1) Hobey *v.* Kingsbury, 1 Str. 527.

(2) Great Bedwin *v.* Wilcot, 2 Str. 1158. Burr. S.C. 163. "In this case the "order stated, that C. M. being reduced to great poverty, lately applied to the churchwardens and overseers of the parish of W. aforesaid, "who accordingly did relieve him." But adjudged insufficient, for it does not appear that it was at the parish expence. See ante, 177. n. (4).

that

that she was chargeable, in order to shew that she was a proper object of removal, within the meaning of the law. (1)

But an order for the removal of a single woman under this act, stating, "that A. E. single woman is, by being pregnant, deemed to have become chargeable to the said parish," &c. is good in form, for the premises are stated as in the statute itself, from whence the conclusion is drawn; and therefore all is stated which the statute requires. (2)

And it is sufficient that the order charge a woman, whether married or unmarried, (if pregnant with a child likely to be born a bastard) generally as actually become chargeable to the parish, without setting forth the manner in which she has become so. For the justices are to draw the conclusion, whether chargeable or not, and it is enough for them to state that conclusion upon the face of the order, without stating the premises on which it is founded. If that conclusion be disputed, the party is to appeal; and if upon appeal the facts are stated to the superior court, they are to see whether the premises warrant the magistrates in drawing that conclusion. (3)

III. *Of stating the Examination.*

As the examination ought to be taken before two justices (4), if it states "it appears upon examination to be made before us, or one of us," it is bad. (5) Examination must appear to be taken before two justices.

(1) Rex v. Holme Quaver, 11 East, 381.

(2) Rex v. Diddlebury, East. 47 Geo. III. 9 East, 398.

(3) Rex v. Tibbenham, 9 East, 388.

(4) Ante, 182. and per Lee, C. J. Rex v. Stansfield, post. 197. (3).

(5) Ware v. Stanstead, 2 Salk. 488. ante, 182. (2).

The

Upon oath.

"Due examination," or "due consideration," tantamount.

The statute directs, that it shall be upon oath; but if the order profess to be made "upon due examination," without saying *upon oath*, it is sufficient; for in an order, it shall be intended to be upon oath (1). So it was held sufficient to recite in the order, that "upon due examination of the party, and upon his affirmation, &c." without adding that he was a quaker (2); and if the adjudication is "upon due consideration of the complaint," and not upon *due examination*, &c. it will do, for *due consideration* implies a due examination (3). So, if it profess to be made "upon examination of the premises upon oath, and other circumstances, it is sufficient. (4)

IV. *The Description of the Parties.*

Description of parties. Must state the name, or that it is unknown.

"Family" too general.

An order must describe the parties with sufficient certainty. The form of one was: "Whereas a certain woman was brought to bed of a female bastard child in N. and afterwards dropped in S. these to convey, &c." and held bad; for *per* Parker, C. J.—"You must either name her, or say you do not know her (5)." An order to remove a man and his family is bad as to the family, for it is too general (6). It is usual, therefore, and perhaps necessary, to set forth the name of the wife, and more especially of the children, where they are known. (7)

(1) Munger Hunger *v.* Warden, 2 Sess Ca. 40

(2) Rex *v.* Cirencester, cited in Munger Hunger *v.* Warden, supra, (1)

(3) Rex *v.* [illegible], 2 Sess Ca. 45.

(4) Rex *v.* Bagworth, [illegible] ante, 181. (1).

(5) [illegible] *v.* Needwell, Sett. and Rem. [illegible]

(6) Benton *v.* Siston, 1 Str. 114 Johnson's case, 2 Salk. 485. Anon Salk 482. Comb. 478. Wangford *v.* Brandon, Carth. 449

(7) See Blixton *v.* Royston, 1 Sess. Cas. 11. Fol. 278

If

If an order be made for removing a man, his wife, and children, and the adjudication respects only the father's settlement, the children's ages should be set forth (1), or the order will be bad as to them; and if it appear that the child is above seven years old, then it must adjudge that the child has not gained a settlement in its own right (2). But if it expressly adjudges the place to which they are removed to be the last legal settlement of the children, it need not specify their ages. (3)

When necessary to state children's ages.

When that child has gained no settlement in its own right.

V. *Of the Adjudication.*

An order of removal is a judgment which must be certain and positive; although, therefore, there is no necessity for any particular form of words (4), yet it ought, in averring all essential facts, to use express and positive words of adjudication; as, "we adjudge;" or, "it appears to us, &c."; "the parties are, &c."; and it must either set them forth in the adjudication, or plainly refer to them when sufficiently stated in the complaint. (5)

Adjudication must be certain.

May refer to statement in complaint.

(1) See Hobcy *v.* Kingsbury, ante, 194. (1).

(2) The order set forth, "It appearing to us, &c. that his (the father's) settlement is in A." without saying that it was likewise the settlement of his wife and children; "we do therefore adjudge the settlement of the father, wife, and children to be in A." Held good as to the father and his wife, but quashed as to the children, for the reason given in the text. Rex *v.* Trinity, in Chester, 2 Sess. Cas. 74. Rex *v.* Leverington, Burr. S.C. 276. where one of the children removed was eight years old; the judges in court concurred in opinion "that children of such *tender age* cannot be supposed to have gained any other settlement than the derivative one from their father."

(3) Rex *v.* Heptenstall, Burr. S.C. 88. Rex *v.* Ufculm, ib. 138. 2 Bott. 654. Pl. 710, 711. S. P. Rex *v.* Bowling, Burr. S. C. 177. Rex *v.* Normanton, ib. 213. Rex *v.* Stansfield, ib. 205. ante, 195. (4). Ringmore *v.* Petworth, Sett. and Remov. 41. Reg. *v.* Middleham, post, 202. (2). Rex *v.* Bucklebury, ib. (3).

(4) Per Lee, C. J. Ufculm *v.* Clysthydon, Burr. S. C. 138.

(5) See the opinion of Lord Hardwicke, C. J. Bourne *v.* Spalding, Burr. S. C. 38.

 Thus,

"On examination believe the same true," bad.

Thus, where it only stated, "we, on examination do believe the same to be true;" this was held to be no adjudication, and the order was quashed. (1)

Settled "according to our knowledge," &c. bad.

So, if it adjudge that the pauper was last legally settled in B. "according to their knowledge," it is uncertain; for the pauper might be settled elsewhere, and the justices not know it. (2)

Two things to be adjudged.

The same things must be adjudged in this part of the order, as should be stated in the complaint, viz.

1st, Party chargeable.

1st, That the parties are actually chargeable to the parish making the complaint, which is usually done by adjudging the complaint to be true. (3)

2d, His settlement.

2d, That they are legally settled in the parish to which it is directed that they shall be conveyed.

1st, Actually chargeable since 35 Geo. III. c. 101.

As the complaint, since 35 Geo. III. c. 101. must state (4), so the order must adjudge, that the parties are actually chargeable to the parish, as was previously necessary where paupers resided under a certificate.

As in case of certificated paupers.

A man who came into a parish by certificate was removed by an order, setting forth, "that they removed him because he was likely to become chargeable." It was quashed; for they cannot remove him until he becomes actually chargeable to the parish. (5)

(1) Stallingborough *v.* Hathay, 1 Sess. Cas. 131.

(2) Rex *v.* St. Mary Ottery, Sett. and Remov. 32.

(3) See the form of the order, 3 Burn's Just. tit. Removal.

(4) Ante, 194. (2).

(5) Malden and Fletwick, 2 Salk. 530. Teelby *v.* Willerton, 1 Str. 77. S. P. and it must be so alledged in the complaint, ante, 194. (2).

An

An order was made, reciting, that "whereas complaint has been made unto us by the, &c. that J. S. who is lately come into the parish of, &c. with a certificate according to 8 and 9 W. III. is actually chargeable, &c." and quashed; for the justices must adjudge him to be chargeable, or at least must say it appeared to them that he was so. (1) "Complaint, &c. that J.S. is actually chargeable," &c. bad.

"Whereas it appears to us, upon the oath of E. J. relict of E. J., that she and her daughter Mary were last legally settled in R. *who are likely to become chargeable.*" The adjudication is sufficient; for the words, "who are likely to become chargeable," are always the words of the justices; if it had been, that "they are likely to become chargeable," then it had been a recital only, and the words of the overseers. (2) "It appears to us, on oath of J. that she and her daughter, &c. who were likely to become chargeable," &c. sufficient.

And if it state that "they have become chargeable," it is sufficient, for this must mean that they are become so. (3) "Have become chargeable," good.

(1) Malden *v.* Fletwick, 2 Salk. 530. and prior to 35 Geo. III. c. 101. See Suddlecomb *v.* Burwash, 2 Salk. 491. and various decisions quashing orders for want of an express adjudication, that the party was *likely to become chargeable.* "Will become chargeable, if permitted to abide," Anon. Sett. and Rem. 39. "Likely to become chargeable, as we are credibly informed," Ib. 38. Or that he "may become chargeable," Teelby *v.* Willerton, 1 Str. 77. held bad. An order removing a poor child was quashed, because it was not said that the parents were unknown or likely to become chargeable to the parish: For though a child of three months old be helpless, yet the parents are bound to provide for it. Christ's Hospital's case, 2 Salk. 485.

(2) Reg. *v.* Rockville, Sett. and Remov. 21. Quære, tamen as to the latter observation; for the order would still run, "It appears to us, upon the oath of E. J., &c. that she and her daughter, &c. are likely to become chargeable." The insertion of the relative pronoun "they" seems to make no difference in the sense. See Rex *v.* Binegar, 7 East, 377. ante, 193. (3).

(3) Rex *v.* Honiton, Burr. S. C. 680. Rex *v.* Binegar, supra, (2).

Adjudge them chargeable to the parish removed from.

The complaint should likewise shew, that they are [likely to] (1) *become chargeable to the parish from whence they are removed*, and there must be an adjudication of the truth of it. An adjudication in this form: "and whereas, upon due examination and enquiry made into the premises, it appears to us, and we accordingly adjudge, that the said, &c. are likely to become chargeable;" without adding *to what parish*, was quashed, although it might have been inferred, that they must have become chargeable to the parish making the complaint. (2)

Two objections were taken to an order of removal, 1st, That the parish of E. is at first mentioned in it; and then it goes on, "and has lately intruded himself into *your said town of* E." So that it is uncertain whether E. be a town or a parish. But this objection was over-ruled as being over-nice. The 2d objection was, That the pauper is only alledged to be "likely *to become chargeable there*. Which does not alledge "that he was likely to become chargeable to the parish." Denison J. and Foster J. (3) over-ruled the objection. But Wright J. took it that the word "*there*" did not necessarily import that the pauper was likely to become so to the parish. (4)

2d, Place removed to the last settlement.

2d, It must adjudge the place to which he is removed to be the place of the pauper's last legal settlement, ex-

(1) These words must be omitted since 35 Geo. III. c. 102. See ante, 198. (4).

(2) Ufculm *v.* Clysthydon, Burr. S. C. 138. S. P. adjudged, Rex *v.* Bradford, Sett. and Rem. 40. Nicholas *v.* St. Peter's, 2 Sess. Cas. 73. Rex *v.* Minchinghampton, 2 Sess. Cas. 92. Rex *v.* Spalding, Burr. S. C. 43. Where the adjudication was, "that he was likely to become chargeable" omitting every thing as to what parish he was so, so that it might be to his relations. Rex *v.* Netherton, Burr. S. C. 139. But Rex *v.* Whitam, 1 Str 142. Maidstone *v.* Dothing, ib. 293 Rex *v.* Leofield, ib. 698. is contra, but they are said to be loose notes. See Burn's Just. tit. Removal.

(3) The Chief Justice was absent.

(4) Rex *v.* Eakring, Burr. S. C. 220

cept

cept where the removal is back to a parish giving a certificate; for the justices need not adjudge it in that case (1). "Whereas complaint has been made to us that J. D. with his wife and children, came from his place of abode and last legal settlement in B. to A., we therefore require you, &c." This order was quashed as naught; for there is no adjudication which was the place of his last legal settlement, but only a complaint that B. was (2). "We order him to be removed to A. *as the place of his last legal settlement*," bad, as there is no adjudication (3). "That the pauper was legally settled at B. *according to their knowledge*," bad, for he might be settled elsewhere and the justices not know it (4). Or, "that B. is, as we are credibly informed, the place of his legal settlement," bad. (5)

Removed to B. "as the place of his last legal settlement," bad.

"Whereas complaint has been made unto us that E. F. wife of U. F. is lately come into the parish of St. Giles, and is likely to become chargeable to the same; and whereas, on oath made by the said E. F. it appears, that her husband, was last legally settled at H. these are therefore, &c." quashed, because there is no judgment of the justices concerning the last legal settlement, but only the oath of the woman. (6)

On oath it appears, that her husband was "last legally settled," &c. bad.

An order adjudged "that J. S. was settled at B. and therefore the justices remove his widow and children to B.;" quashed, for the wife may get a settlement after the death of her husband. (7)

Adjudication of widow's settlement.

(1) Malden *v.* Fletwick, 2 Salk. 530.

(2) Bury *v.* Arunel, 2 Salk.

(3) Rex *v.* Westwood, 1 Str. 73.

(4) Reg. *v.* St. Mary Ottery, Sett. and Rem. 32.

(5) Trowbridge *v.* Weston, 2 Salk. 473.

(6) Rex *v.* Hackney, 2 Salk. 478. The words "*to us*," were omitted after "it appears."

(7) Eghurn *v.* Hartly Wintly, 1 Sess. Cas. 45. Pl. 691.

An

Removal of wife and children to husband's settlement, must adjudge them his.

An order removed F. S. and F. *her* daughter, about four years old. E. *her* daughter, about two years and a half old. It further recited, that it appeared to the justices, upon the oath of F. S. "that her husband G. S. was legally settled in the parish of M.;" quashed, for though it does not appear that the woman is a widow, and the wife and children must follow the husband's settlement, yet the children are not removed as his children, nor the woman as his wife. (1)

If children above seven, must adjudge their place of settlement, adjudging it to be that of their father, insufficient. Adjudging their own settlement, need not state it to be that of the parent.

The exception to an order was, because the justices set forth that M. was the last legal settlement of the father, therefore they send the son there, and it appeared that he was ten years old. It was quashed, because there was no adjudication of the son's settlement, and it is not of absolute necessity that the father's settlement should be his (2). But if it adjudge the parish to be the last legal settlement of certain children by name, whom it states to be under the age of seven, it need not adjudge it to be the settlement of their father. (3)

It was objected to an order adjudging that the paupers *were* last legally settled in M. that this is no adjudication of a present settlement. But by Lord Ellenborough, C. J. it refers to the time of the complaint made, and the court cannot intend an intermediate settlement between the hearing of the complaint and the making of the order. (4)

Omission of the word "settlement," fatal.

An order adjudged, "the last legal place of the said H. is at W." omitting the words *of settlement*, and was quashed.

(1) Rex *v.* Mansfield, Burr. S. C. 76.

(2) Reg. *v.* Middleham, Fol. 271. See ante, 197, &c.

(3) Rex *v.* Bucklebury, 1 Term Rep. 164.

(4) Rex *v.* Binegar, 7 East, 377. See Rex *v.* Honiton, ante, 199. (3.)

quashed. *Per Curiam.* Here is no adjudication of a settlement, and these orders are never to be made good by implication. (1)

An order which states that the pauper came into the parish under a certificate, need not set forth that it was allowed by two justices, at least if it go on to adjudge his settlement to be in the parish by which it was granted. (2) How far must state certificate.

As to the description of the parties, both in the complaint and adjudication, see *ante.* (3)

VI. *Of the Direction of the Order.*

The remaining essential circumstance is the fruit or effect of the order, which is to require the officers of the complaining parish to remove the pauper; and those of the place in which the settlement is adjudged to be, to receive and provide for him. If, therefore, it does not say which is to convey, and which is to receive, the persons to be removed (4); or if it directs both to remove and receive (5), it is bad; and it is *à fortiori* defective, where it is directed solely to the officers of the parish in which the settlement is adjudged to be, and requires them to convey the pauper thence; for the justices ought, and can only order the parish officers, where the intrusion is made, to make the removal. (6)

Require officers of complaining parish to remove. Of settlement parish to *receive* and *provide* for. Not stating which to receive, and which to convey, bad. Or if it directs both to remove and receive.

(1) Rex v. Warnhill, 2 Sess. Cas. 91. ante, 200. (2).

(2) Reg. v. Newton, 1 Sess. Cas. 161.

(3) 196. IV. and that the power of adjudication and removal is limited by the complaint, ante, 192.

(4) Binfield v. Banstead, 11 Mod. 268.

(5) Bedwitch's case, Comb. 325.

(6) St. George's v. St. Olave's, 2 Salk. 493.

It

Quære, if good, when directed to a constable to remove.

It seems, that an order directed to the constable of a parish, commanding him to remove a pauper, is well enough, if he remove under it. For if a justice direct a warrant to a person by name, who is no officer, he is not bound to obey it; but if he do, and it is a matter within the jurisdiction of a justice, the warrant will bear him out. (1)

Mistake in name of parish.

A mistake in the name of the parish to which the removal is made does not vitiate the order, where that used is sufficiently descriptive, according to common intendment; more especially if the parish officers have recognised its sufficiency by any act of their own, as by receiving the pauper, or appealing to the sessions against the order.

A pauper was removed from the parish of Topsham, by an order addressed "To the churchwardens and overseers of the poor of the parish of Poole, or town and county of Poole," and that parish was described in the same terms in that part of the order which adjudged the settlement to be there. Upon appeal to the quarter sessions, it was objected, that the town and county of Poole consisted but of one parish, and that the name of that parish was *St. James's*, in *Poole*. The sessions over-ruled the objection, and the court of king's bench were of the same opinion. They said there was no objection to this description of the parish of Poole, although the name of its tutelary saint was omitted; there being but one parish in the town and county of Poole, and Poole being the common name

(1) Wangford *v.* Brandon, Carth. 449. In this case, three poor men and their families were removed by the same order, which was ultimately quashed for another defect. But *quære*, whether a distinction may not exist between an order or warrant of removal, and a warrant founded upon it? However, in 13 & 14 Car. II. c. 12. and 3 W. & M. c. 11. that which is now called an order of removal, is denominated a warrant of removal.

of

of the place. And it was added, that the parish officers had themselves considered this description as sufficient to call upon them to appeal to the sessions against the order, by whom the objection to the misnomer had been overruled. (1)

But if the name of the parish removed to, is altogether mistaken, as if the parish of *Woking* is called *Waking*, it seems as if it would be bad; at least where the officers of the parish have not acknowledged the description to be sufficient by some act of their own. (2)

The parish of Kirkby Stephen consists of ten townships, of which the township of Wharton and the township of Kirkby Stephen are two. A pauper was removed from the parish of Wharton to the township of Kirkby Stephen, by an order directed to the officers of the parish of Kirkby Stephen, and his settlement was thereby adjudged to be "in the parish of Kirkby Stephen." This order was de-

(1) See Vowles *v.* Miller, 3 Taunt. 140. that it is sufficient in trespass to use the name of the parish commonly used; also Rex *v.* Topsham, 7 East, 466. In Rex *v.* St. Nicholas in Harwich, certificate was directed "To the churchwardens and overseers of the poor of the *parish of Harwich near Dover Court* in the county of Essex." The case stated by the sessions, found that the proper name of the parish was St. Nicholas in Harwich, and that there is no such parish as that *of Harwich near Dover Court*, and that it did not appear to them that the borough or corporation of Harwich contained any more parishes than one. The court of K. B. was of opinion, that supposing this to be a *mis-direction, the certificate was good notwithstanding*, because the 8 & 9 W. III. c. 30. does not require any direction of a certificate, and a mis-direction is as a void direction, ante, 38. But Chapple, J. in giving his opinion, added, "Besides, if a direction were necessary, I should doubt whether this mistake of the name would make it bad. I remember a case of a carrier, in Lord Raymond's time, where the plaintiff recovered, though there was no such parish as Wicomb, the true name being Chipping Wycomb," Burr. S. C. 176. As to a mistake in the local name of a county in an order, see ante, 190. and how far a misnomer may be amended by the justices at sessions, under 5 Geo. II. c. 19. see post, chap. xxxvii. sect. 2, and seq.

(2) See Rex *v.* Oswell, 2 Salk. 472. tamen quære.

livered

livered to an overseer of the township of Kirkby Stephen. In a question between the township of Wharton and Kirkby Stephen, respecting the pauper's settlement, the latter was held to be concluded, by not having appealed against this order; for the removal to the parish of K. S. must mean the township of K. S. (1)

Where ambiguity in the direction does not vitiate.

And it seems no objection to the direction of an order, that it is to the churchwardens of the *parish, township,* or *division* of U. (2)," or to the *churchwardens* and overseers of the *township* of H. (3)

Yet where an exception was taken to an order of removal, that the removal was to the parish or hamlet of A. as being uncertain, the court are reported to have quashed it. (4)

SECT. III.

Of the Form of a subsequent Order of Removal, after a Pauper is removed under a former one.

Form of subsequent order.

Original order, how far conclusive.

A SUBSEQUENT order of removal, generally requires the insertion of something in addition to the common form that has been just examined. An order of removal is in effect a judgment. If unappealed from, it concludes the parish which acquiesces in the removal as

(1) Rex *v.* Kirkby Stephen, Burr. S. C. 664. ante, 138.(1). See Spittlefields and Bromley, 18 Vin. Abr. tit. Removal, (H.) pl. 8. page 468.

(2) Rex *v.* Ulverstone, 7 Term Rep. 565.

(3) Rex *v.* Holbeck in Leeds, Burr. S. C. 198.

(4) Rex *v.* Grimstone, 1 Barnard, 11.

against

against the world (1). If the justice's adjudication of a settlement be confirmed upon appeal, it is equally conclusive; but if an order is quashed upon the merits, it only concludes the contending parishes (2); for it is a decision of the appellant jurisdiction between those parties, that the settlement is not in the parish to which the removal was made.

So long as these judgments are in force, the justices have no authority to make a fresh order in direct repugnance to them. (3)

If they make one, therefore, removing the same parties to the place which appears exempted by the prior adjudication, such new order must state that a settlement has been acquired there subsequently (4). For even if there has been time to gain a new settlement, yet the court will not intend or presume any thing of that; but it must be specially stated (5). Thus, if an order removing from A. to B. is quashed by the sessions upon the merits, the pauper cannot be sent again from

Second order, removing to place exempted by first order, must state a subsequent settlement. Court will not presume one.

(1) Ante, 126 sect. 4.

(2) Per Foster, J. Rex v. Bradenham, Burr. S. C. 397., post, 208. (3).

(3) " Also justices of peace may be punished in the manner above mentioned, (i. e. by attachment) for acting in a contemptuous manner against the determination of the court of king's bench; as where an order of settlement specially setting forth the circumstances of the case, is removed into the said court, and quashed there by the judgment of the court upon the merits; and yet the justices of peace afterwards made another order to remove the same person to the same place for the very same cause, without regarding the judgment of the court, though it were well known to them, and insisted on by the parties." Hawk. P. C. book 2. chap. 22. sect. 29.

(4) Per Foster, J. ante, (2). But see post. (5).

(5) Rex v. Bradenham, Burr. S. C. 394. See also Rex v. Levergington, Burr. S. C. 276. Godalming v. St. Michael's in Winchester, ib. 277. But it is not always necessary that it should shew a new settlement. A right of removal, accruing subsequent to the former order, is sufficient. Rex v. Osgathorpe, Burr S. C. 261. post.

A. to B. by a fresh order, unless it states a subsequent settlement in B. (1). So where a pauper was removed from B. to A. by an order which was afterwards quashed, and B. then removed him to F., and F. neglected to appeal. F. removed him to A. by a subsequent order, which was quashed for this defect. (2)

Second order removing to a third parish, must state subsequent settlement, where parish removing, concluded by the first.

And where A. is sent by an order to B. who appeals, and the order is confirmed, B. cannot send him to C. without stating that A. had gained a new settlement; and no new settlement appearing, the order of removal was quashed. (3)

An order of two justices removed J. S. his wife, and four children, from T. to B. 30th December 1754. An order of sessions discharging this order was made next Epiphany sessions. An order of two justices, 28th March 1755, removed the wife and four children from T. to B. and an order made at the next Easter sessions confirmed it. These orders being removed by *certiorari* into the king's bench, the first was quashed, the second affirmed, an the third and fourth were also quashed, because it did not appear thereby that the wife and children had gained a new settlement in B. (4)

(1) Rex *v.* Leigh. Cald 59. Foster *v.* Carlton, 1 Str. 567.

(2) Alderton *v.* Fellingtowe, 2 Bott, 691. Pl. 751. But it would be otherwise if F. had not been concluded as against the world, by neglecting to appeal against the removal from B. thither. In most cases, F. might have disputed the same question with A., upon which the latter had succeeded in its appeal against B. See Rex *v.* Bentley, Burr. S. C. 425. post.

(3) Little Bitham *v.* Somerby, 1 Str. 232. Yet see Thackham *v.* Findon, 2 Salk. 489. Where the justices said they would intend a subsequent settlement, after the lapse of four years. But in Capel *v.* West Peckham, where there was a similar lapse of four years, the Court said they could intend nothing as to a new settlement, and quashed the order. Fortes. 327 2 Sess. Cas. 81.

(4) Rex *v.* Bradenham, ante, 207.

(5).

Extends only to adjudications on merits.

But this rule in case of appeals, obtains only where the judgment of sessions is upon the merits. If an order is quashed for a defect in form, it concludes nothing between the parishes which are parties to the decision, and consequently a second order need not set forth a fresh settlement subsequent to the time when the first was made. (1)

But if the sessions erroneously quash an order of justices which is substantially good, for a defect in form, such order is a bar, notwithstanding, to all subsequent orders, which do not shew that the persons to be removed have acquired a subsequent settlement. (2)

Or where removing parish, concluded by original order

The principle of these decisions, therefore, seems to require, that a subsequent settlement must be stated in all cases where the parish removing is concluded by the first order as to the party's settlement, whether against the world, or the particular parish to which the removal is made; but where it is at liberty to controvert the settlement, notwithstanding the order, it is unnecessary to aver a new one. (3)

SECT. IV.

Of executing an Order of Removal.

Order how executed.

WHEN an order has been thus made and signed (4), it is the duty of the parish officers, who are directed to remove the paupers, to have them safely conveyed, at

(1) Rex *v.* St. Andrew's Holborn, 6 Term Rep. 613. Rex *v.* Penge, Nol. Rep. 176.

(2) Munger Hunger *v.* Warden, Sett. & Rem. 160. 2 Const. 702. Pl. 817.

(3) See ante, 208. n. (4)

(4) It is usual for the justices to make and sign duplicates, that one may be delivered to the parish officers, directed to receive the pauper, and the other retained by the removing parish, or the magistrates

the expence of their parish (1), to the place thereby required to receive and provide for them. If the paupers refuse to remove in obedience to the order, it seems to contain sufficient powers to enable the persons to whom it is directed to convey them by force; but at all events the parish may obtain a warrant, under the hand and seals of the magistrates, to enforce it by compulsory means. The person, to whom the duty of removal is entrusted, should safely deliver the poor, together with the order, to one of the parish officers of the parish directed to receive them. Or if only one original is made, he should give a copy, and shew the original. But if the original is delivered, and a copy kept, that is sufficient (2). It seems also to be enough to produce the justice's warrant to convey the pauper, inasmuch as the magistrates may retail the original order. (3)

Punishment when officers refuse to obey.

If the parish officers refuse to execute or obey an order of this kind, they may be punished by indictment (4); for the only means by which a parish, thus required to receive a pauper, can get rid of the order, is by appeal to the quarter sessions. (5)

The duplicate original order should be carried by one of the justices, who signed it, to the next general or quarter sessions, and retained in the hands of the clerk of the peace, as a conclusive record of the settlement, where the receiving parish neglects to appeal. (6)

(1) Per Lee, C. J. Rex *v.* Stansfield, Burr. S. C. 205. post. 213. (1).

(2) See Rex *v.* Kirkby Stephen, 2 Bott, 675. Pl. 736. a copy made by the pauper admitted in evidence after notice to produce the original served on the parish removed to.

(3) See the opinion of Holt, C. J. ante, 132.

(4) See 13 & 14 Car. II. c. 12. s. 3. As to the punishment of parish officers for neglect of duty, see post. title, Remedies against Parish officers, &c.

(5) See post. title, Appeal.

(6) See ante, 132. The proper officer is the *custos rotulorum*. Per Holt, C. J. Skin. 528, 529. the clerk of the peace being his deputy to this purpose. See 37 Hen. 8. 1. 1 W. & M. 21. s. 5. Harcourt *v.* Fox, Show. 429 506 516. 536. Show. Par. Ca. 163. 4 Mod. 167.

SECT.

SECT. V.

Of the Removal of the Poor by Pass-Warrants.

As this species of removal is not strictly a part of the law respecting the settlement and maintenance of the poor, it does not require a minute examination in the present work.

It depends upon 17 Geo. II. c. 5. s. 7. s. 8. s. 10. 32 Geo. III. c. 45. s. 1. s. 3. s. 4. s. 5. s. 6. s. 7. (1), which preserve the ancient distinction already observed upon, between the vagrant and impotent poor. (2)

Statutes regulating removals by pass

These laws only respect persons who are in a state of actual vagrancy, such as they describe. No other persons can be sent by a pass, even at their own request (3); but they must be regularly removed to their place of settlement, by an order of two justices, under 13 & 14 Car. II.

Respect only persons in a state of vagrancy. No others removable thereby.

The 32 Geo. III. c. 45. s. 1. recites, that great abuses are committed in conveying, from one place to another, by passes, persons who were not rogues and vagabonds, and enacts, by way of remedy, that all rogues, or vagabonds, when ordered to be passed, shall be either publicly whipped, or imprisoned in the house of correction till the next sessions, or for a shorter period, at the justice's discretion, but not for less than seven days.

35 Geo. III. c. 44. s. 1.

(1) See Appendix.
(2) Ante, Vol. i. 236.
(3) Rex v. Welcham, 2 Bott, 658. Pl. 721.

By

Must be a conviction to warrant a pass.

By the express words of this statute, the party must not only have committed an act of vagrancy, but be convicted thereof, before he is removed under a pass. (1)

Distinction between passes and orders of removal.

The distinction between passes and orders of removal is thus clearly explained by Lord C. J. Lee. "We have considered the question, whether, by the late act of 13 Geo. II. c. 24. a pass, unappealed from, be as conclusive as an order of two justices unappealed from? and we are of opinion, that this act of parliament is not to receive such construction, or be considered in such manner, as to put a pass upon the foot of an order of two justices in this respect. In case of an order of two justices, two other justices cannot make a different order, because the authority of each two would be equal; and therefore it would be a clashing of the same authority. But that does not seem to be the present case at all. This act of parliament of 13 Geo. II. was made only in order to secure vagabonds, and to send them to their former place of settlement or birth, if to be found; if not, then to the places from whence they came; *and it operates upon such as are actually vagabonds.* But the act of 13 & 14 Car. II. c. 12. was made with a view to prevent vagabonds, and therefore it gave power to fix them in their last place of settlement. But, the authorities given by these two acts are very different. On that act of 13 & 14 Car. II. c. 12., though complaint may be made to one justice, yet one justice cannot act singly; here, one single justice may act. So there is a difference too as to the manner of sending them. Upon that act, the removal is to be at the expence of the parish; here, of the county. Another thing that makes one believe the parliament did not intend to put this pass-warrant, signed by a single justice, upon the foot of an order, made by two justices, is, that

Object of 13 Geo II. to operate only on vagabonds.

Act 13 & 14 Car. II to prevent them.

Difference between powers given under these acts

As to number of justices.

Manner of sending.

(1) Sect. 1. This point was unsettled prior to this act. See Rex v. Mere Cole, 2 Bott, 670 Pl. 729.

though

though the reason would be the same, yet the same care is not taken as to the provision on appeal; for, upon an appeal from an order of two justices, there is a provision for costs, but none on this act. Here are no costs given on appeal; yet that provision would be as reasonable as in the case of an order of two justices, if it had been intended to be put upon the same foot in all other respects; but upon appeals from orders of two justices, costs are payable. Now, it would be something extraordinary, and cannot well be conceived to have been the sense of the legislature, that a person, being sent by one justice of peace, shall have the same effect as if sent by two, and yet that there should not be the same remedy upon appeal. Therefore, we are of opinion, that the act made in relation to vagrants, and the manner of passing them, was in a different view from that which was calculated for the fixing of settlements; and, that the act is only calculated to convey them to their settlement, if it can be found; or (in cases where their settlement is not found), only to remove them to the place of their birth, or the abode of their parents, or where last found begging, &c. there to be provided for according to law; and that provision is, "to keep them till their last legal settlement can be discovered, but no longer." And then they will be subject to a removal, by virtue of the former act, to their place of last legal settlement; on which removal an appeal will lie, subject to costs." (1)

As to appeal.

As to costs.

It has been determined, therefore, not only that a removal under a vagrant-pass is not conclusive against the parish to which the removal is made, by not being appealed from (2), but that no appeal lies to the quarter

Want of appeal against vagrant-pass is not conclusive, but a general

(1) Rex *v.* Stansfield, 2 Burr. S. C. 205. 2 Bott, 658. Pl. 722.

(2) Rex *v.* Stansfield, ante, (1). Rex *v.* Upmerden, Burr. S. C. 214.

 sessions

appeal does not lie against it.

sessions against it (1). For the 17 Geo. II. c. 5. did not mean to give an appeal against a vagrant-pass, which is inconsistent with the eleventh section of it. If the sessions should, upon such appeal, enter into the merits, they could not send him back to the place where he was only a vagrant, nor to any other; *he cannot be removed from the place to which the pass has sent him by any other method than an original order of two justices.* The proper subject of an appeal is, an adjudication; a pass only recites, "that it appears upon examination of the vagrant:" it is not such a positive adjudication as there is in an order of removal by two justices. There is no reason for an appeal in such a case, nor hardship upon the parish to which the vagrant is passed; for as soon as they can find out where his legal settlement is, if it really is not with them, they may remove him to it by a common order of removal. (2)

Quære, if made by the vagrant, or in case of a foreigner, unsettled.

The court in the foregoing decision expressly stated, that the appeal before them was only a general appeal from a pass; and declared, in a subsequent case, that they did not give any opinion whether it would not lie, if the vagrant himself appealed against such a pass, or if the person sent by it were a foreigner. (3)

(1) Rex *v.* Ringwould, Burr. S. C. 840. Rex *v.* St. Lawrence Jewry, Cald. 18.

(2) Ib. But Rex *v.* Justices of Sussex, Burr, S. C. 844. seems contra; and in Rex *v.* Stansfield, and Rex *v.* Upmerden, ante, 213. (2), it appears to have been taken for granted, that an appeal would lie, although a pass unappealed from was not conclusive.

(3) Rex *v.* St Lawrence Jewry, ante, (1)

SECT.

SECT. VI.

Of suspending Orders of Removal and Pass Warrants.

MAGISTRATES have obtained powers to suspend the execution of orders of removal and vagrant passes by the humane provisions of 35 Geo. III. c. 101.

It is enacted by section 2, "*And whereas poor persons are often removed or passed to the place of their settlement* during the time of their sickness, to the great danger of their lives: for remedy whereof, be it further enacted, by the authority aforesaid, that in case any poor person shall from henceforth be brought before any justice or justices of the peace, for the purpose of being removed from the place where he or she is inhabiting or sojourning, by virtue of any order of removal, or of being passed by virtue of any vagrant pass, and it shall appear to the said justice or justices, that such poor person is unable to travel, by reason of sickness or other infirmity, or that it would be dangerous for him or her so to do, the justice or justices making such order of removal, or granting such vagrant-pass, are hereby required and authorized to suspend the execution of the same, until they are satisfied that it may safely be executed without danger to any person who is the subject thereof; which suspension of, and subsequent permission to execute the same, shall be respectively indorsed on the said order of removal or vagrant-pass, and signed by such justice or justices. (1)

(1) As to the expences of maintaining such paupers pending the suspension of these orders, see post, Chap. xxxiv. sect. 1.

"The

"The words of the act are, if any poor person shall *be* "*brought* before any justice." To construe these words in their literal sense would prevent the suspension of orders of removal in cases where it is most necessary that it should take place, namely, when the pauper cannot, from sickness or other calamities, be brought before magistrates, and when it might be highly inconvenient, if not dangerous, for a justice to visit them. As this construction would be to give effect to the letter by a repeal of the very object of the statute, and expose the pauper, in cases of extreme sickness or infirmity, to the very mischief the act was intended to remedy; the Court of King's Bench has decided, that as paupers may be removed in some instances, without being brought personally before the justices, (1) the operation of such an order may be suspended in the same manner, when required by the circumstances of the case. For the meaning of the act is, "not that when any person was brought personally, but where his case was brought judicially before the magistrates for the purpose of his removal, that they should have power to suspend the execution of the order of removal if it appeared to them, that is, by due examination of the facts, that from sickness or infirmity of the party the removal could not then be safely made." (2)

49 Geo. III. c. 124. suspension removed by another justice.

The 35 Geo. III. seemed to confine the power of removing the suspension to the justice or justices by whom it was originally imposed. But as this might be attended in various instances, such as the occasional absence or death of the removing magistrate, with great inconvenience; a remedy is provided by 49 Geo. III. c. 124. s. 1. which enacts, that "in all cases wherever the execution of any order of removal, or of any vagrant pass, shall be

(1) But that if he can be brought it should be done. Per Holt, C. J. Comb. 478. ante, 181.

(2) Rex *v.* Everdon, 9 East, 101. See 49 Geo. III c. 104. sect. ante.

hereafter suspended by virtue of the said recited act (1), it shall be lawful for any other justice or justices of the peace, of the county or other jurisdiction within which such removal or pass shall be made, to direct and order that the same shall be executed, and to direct the charges to be incurred as aforesaid to be paid, and to carry into execution any such amended orders as aforesaid, as fully and effectually, to all intents and purposes, as the said respective powers and authorities can or may be executed by the said justices who shall make any such order of removal, or by the justice who shall grant any such pass as aforesaid."

Order suspended as to an entire family.

In order to prevent any pretence for forcibly separating persons nearly connected with or related to each other, and living together as one family during the suspension of an order of removal or vagrant pass, by reason of the sickness of one or more of the family, it is enacted and declared by the same statute, "That where any order of "removal or vagrant-pass shall be suspended by virtue "of this or the said recited act (1), on account of the "dangerous sickness or other infirmity of any person or "persons thereby directed to be removed or passed, the "execution of such order of removal or vagrant-pass shall "also be suspended for the same period, with respect to "every other person named therein, who was actually of "the same household or family of such sick or infirm "person or persons, at the time of such order of remo-"val made or vagrant-pass granted."

A husband, his wife, and children, were removed by an order of justices to the place of their last settlement, and the order was suspended as to the husband, until it should appear that he was sufficiently recovered to be

(1) 35 Geo. c. 101.

able

able to travel. The husband dying, the wife and children were subsequently removed without an order removing the suspension of the original order. The justices had likewise made a third order, which, after stating that the death of the husband had been proved, and that the reasonable charges incurred by the suspension amounted to 41l. 4s. 6d., directed the officers of the parish removed to, to pay those charges to the officers removing the pauper. These three orders were quashed on appeal as insufficient, inasmuch as the suspension of the original order had not been taken off by a magistrate's order upon the husband's death. But the court of King's Bench thought that the Sessions could not quash these orders which were all good upon the face of them on that ground. The respondent's counsel suggested that the husband's death put an end to the order of suspension; but the court did not decide the case on that ground, and it was observed *è contra* that the terms of the order of suspension did not apply to the case of death, but was to operate till the sick person could be safely removed. (1)

SECT. VII.

Of Removals which are neither to the Place of Settlement, under 13 & 14 Car. II. c. 12. *nor as Vagrants by Passes under* 17 Geo. II. c. 5. s. 7. *and the subsequent Statutes.*

Removals under magistrates' general power.

Dr. Burn observes, "that, besides the general form of removal to the place of settlement, there may be other removals, as of wives to their husbands, children to their parents, apprentices or servants to their masters; of persons brought illegally from one parish to another. But

(1) Rex v. Englefield, 13 East, 317.

this

this is not in pursuance of the statute 13 & 14 Car. II. but of the general power of the justices in regulating matters relating to poor persons." (1)

The object of such orders is solely for the party's removal, and they should not contain an order of maintenance (2), which magistrates have no authority to make under these circumstances.

A constable without warrant brought a child from Broughton to Banbury. Two justices of Banbury made an order, (reciting the fact,) to return the child to Broughton, there to be provided for, according to law. The court held the order good for returning the child to the wrong doers, and, therefore, that part of the order was affirmed; but it ought not to have said to be there provided for, but they are to be left to take their course according to law. (3)

Child removed without warrant.

Two justices sent S. G. from the parish of Gravesend to her master, with whom she lived as a hired servant, at the parish of Chadwell, in Essex, concluding the order, "until she shall be discharged." The justices of Essex sent her back to Gravesend. It was insisted the second order was ill, being made before the time for appealing against the first order expired. *Sed non allocatur;* for the first order was to send her to her master, from *which no appeal lies,* and not to send her to the parish of Chadwell, as the place of her settlement. (4)

Maid servant to her master, previous to her discharge.

Two justices removed a man from Honiton to South Beverton. The parish of S. B. appealed, and the ses-

Removal after order quashed on appeal.

(1) Burn's Just. tit. Poor Removal. This authority is seldom if ever exercised, and they seem liable to abuse, as no appeal lies from them. See also ante, 138, et seq. 214.

(2) Rex *v.* Banbury, Comb. 372.

(3) Ib.

(4) Rex *v.* Gravesend, Comb. Rep. 97.

sions

sions reversed the order: now, two justices may remove him to H. again; for it is but in execution of the order of sessions, which could not otherwise be done, because it is out of the jurisdiction of the sessions. (1)

As these orders are not made in pursuance of the 13 & 14 Car. II. which gives a right of appeal to the parties aggrieved by removals under it, no appeal lies against them. (2)

SECT. VIII.

Of returning after Removal.

13 & 14 Car. II. c. 12.

THE 13 & 14 Car. II. c. 12. which enabled two justices to remove persons intruding into parishes, excepted by sect. 3. persons going to work in another parish, with a certificate from the minister of the parish, one churchwarden, and one overseer, certifying, that they were inhabitants of that place, and had left part of their family behind.

The section proceeds to direct, that they shall return when the work is finished; and that if they do not, or if they fall sick, or become impotent, they shall be removed to the certifying parish. After which it goes on to provide, "and if *such* person or persons shall refuse to go, or shall not remain in such parish where they ought to be

(1) Honiton *v.* South Beverton, Comb. 401. See also Reg. *v.* Milverton, 7 Mod. So a poor woman, improperly removed by a vagrant-pass, was sent back by an order of two justices. Rex *v.* Welchman, 2 Bott, 658. Pl. 721. And see the reasoning of Aston and Ashhurst, J. Rex *v.* Ringwould, Burr. S. C. 840. ante, 214.

(2) Rex *v.* Gravesend, supra (1), & see ante, 214.

settled

settled as aforesaid, but shall return of his own accord to the parish from whence he was removed, it shall and may be lawful for any justice of the peace of the city, county, or town corporate, where the said offence shall be committed, to commit him to the house of correction, there to be punished as a vagabond, or to a public workhouse in the parish, as hereafter mentioned, there to be employed in work or labour."

As the act contained no other provision, by which persons coming into parishes without these certificates could be punished in a summary way for returning after removal, it seems to have been formerly thought, that the power of commitment was general, notwithstanding the words of reference, and extended to all cases of removal under the statute (1). But the court appear to have been of opinion, ultimately, that its operation was confined to the certificated persons described in the section itself. (2)

This defect is remedied by 17 Geo. II. c. 5. which extends to all cases of removal under 13 & 14 Car. II. c. 12.

SECT. 1. provides "that all persons, who shall *unlawfully* return to such parish or place from whence they have been legally removed by order of two justices of the peace, without bringing a certificate from the parish or place whereunto they belong, shall be deemed idle and disorderly persons, and it shall and may be lawful for any justice of the peace to commit such offenders (being thereof convicted before him, by his own view, or by their own confession, or by the oath of one or more cre- 17 Geo. II. c. 5.

(1) See the opinions of Lord Mansfield, C. J. Foster and Wilmot, J. Baldwin v. Blackmore, 1 Burr. 601. and Rex v. Hall, post. 226. (4).

(2) Lord Mansfield's judgment, ib. et infra.

dible

dible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one month."

Illegal commitment.

The following case will serve as a material comment upon the clauses of both statutes.

Quære, 1. Whether there must not be a conviction of vagrancy previous to commitment for returning? 2. Whether a wife can be convicted who returns with her husband? Commitment must be either under 13 & 14 Car. II. c. 12. or 17 Geo. II. c. 5.

The plaintiff and his wife, being paupers, were regularly removed from M. to B. as the place of their last legal settlement, which order was not appealed from. They returned of their own accord, and without bringing any certificate with them from B. to M. Complaint of this being made in writing, upon oath, by the overseers of M. to the defendant, who was a magistrate of the county, he committed both the paupers to the house of correction, till they should be discharged by due course of law. An action being brought against him by the paupers, a case was reserved at the trial, stating these facts, and two questions were afterwards made in the Court of King's Bench. First, whether there ought to have been a previous conviction of vagrancy? Secondly, whether the wife could be convicted of vagrancy, or be liable to be sent to the house of correction, for returning without a certificate, as she only accompanied, and resided with her husband? Lord Mansfield delivered the resolution of the court. There are two acts of parliament, the 13 & 14 Car. II. c. 12. and the 17 Geo. II. c. 5. upon one of which this warrant must be founded; though it does not appear upon which of the two the justice proceeded. Now this warrant is not within this former act of 13 & 14 C. II. nor is the case itself within it. "*These persons did not go to any parish, carrying with them a certificate of their being inhabitants of their proper parish*; nor is the commitment made to the house of correction, there to be punished as a vagabond;" nor "to a public workhouse, there to be employed

ployed in work and labour," as that statute directs. So that the warrant is not at all agreeable to the directions of that act, which specifies the particular manner of sending the offender to the house of correction, or to a public workhouse; for it is only, "to *remain till discharged by due course of law.*" Neither can this warrant be good upon the 17 Geo. II. c. 5. because, though this is indeed a commitment to the house of correction, which the latter act directs, yet it is "to remain *there till discharged by due course of law;*" whereas, by this act, the power given to the justice is, "to commit such offenders to the house of correction, there to be kept to hard labour for any time *not exceeding one month.*" But this warrant is quite general; it is an indefinite commitment, not for a precise limited time, as this act expressly directs and requires. Therefore this warrant of commitment is totally illegal, and consequently the plaintiff is entitled to the damages that he has recovered. And you will observe, that we go only upon the warrant, which, for these reasons I have mentioned, we hold to be totally illegal. (1)

It seems not to be distinctly ascertained what shall be considered as *an unlawful returning* after removal, so as to subject the party to be convicted as an idle and disorderly person under 17 Geo. II. c. 5.

Unlawful returning, what?

Lord Kenyon lays it down, that there is nothing in an order of removal unappealed from to prevent the pauper's returning to the parish from which he has been removed, provided he does not return in a state of vagrancy. Thus where a person who had rented and resided on a tenement of the value of 10l. a-year and upwards, was removed by an order of removal, which was not appealed

Party may return if not in a state vagrancy

(1) Baldwin v. Blackmore, 1 Burr. Rep. 595.

from.

from, the court held, that it was not in the power of the two magistrates who removed the pauper, nor of the justices at their sessions on appeal, to put an end to the contract respecting the taking the tenement, and, therefore, the pauper who returned immediately, and resided forty days, acquired a settlement thereby. (1)

But in a case where a yearly servant was removed from his service by such an order, and returned in a few days without appealing, Mr. J. Buller delivered it as his opinion, "that after the order of removal unappealed from the pauper could not legally return to the parish from whence he had been removed: it would have been a crime in him to do so; and if he had been indicted for such a disobedience of the order, it would have been no defence to him to have urged that he returned for the purpose of completing his contract. The order of removal put an end to the contract." (2)

The statute seems to consider, that every immediate return into a parish from whence a pauper is removed, unless the party comes back in some condition which exempts him from being removed under the poor laws, is an unlawful returning, by which he incurs the guilt of vagrancy. If, therefore, a person who has been removed returns to the same parish, in some capacity which gives him an inchoate right to gain a settlement by residence there, or if he comes in a state of affluence to a tenement of that value which exempts him from the provisions of 13 & 14 Car. II. he is not liable to punishment under this act. (3)

(1) Rex v. Tillonsley, 2 Term. Rep. 709, ante 131, n (1).

(2) Rex v. Kenilworth, 2 Term. Rep 598, ante, 131 n (4).

(3 Quære the effect of 35 Geo. III c. 101 when a pauper returns who, from his condition in life, is likely to become chargeable, but is not actually so, being able to earn a livelihood. See Rex v. Angel, post. 226.

It appears from the foregoing cases, that a previous conviction of vagrancy is necessary to enable a justice to commit for returning after removal, except in the cases provided for by 13 & 14 Car. II. c. 12. sect. 3.

Where a person has returned after removal, and is imprisoned under a commitment, purporting to be "for returning from the parish," to which he was legally removed, it is void unless he state the place to which he returned. For it will not be intended that he returned to the parish from whence the commitment states him to have been removed. (1)

Commitment must state the place to which he returned.

The justices of the county having a petty sessions to search for vagrants, a pauper, *residing* in B. confessed himself settled in S., whereupon the justices ordered him to be removed to S.; but the pauper threatened to return, and did return the same day to B., pretending, colourably, to be a hired servant to a parishioner there. Whereupon, the defendant, who was a magistrate, and present at the petty sessions, without any summons or oath made of his return, committed the pauper to the house of correction, where he was kept three days. On a motion for an information, the Court allowed the transaction in this case to be irregular, because there was no complaint made of his being chargeable, or being likely to be chargeable, to B.; but being only a mistake of judgment, they would not have thought it worthy of punishment; but the sending him to the house of correction was punishing him after having convicted him unheard, and that is contrary to natural justice. And upon the authority of Rex *v.* Justices of Hertford, they were for granting the information; but no malice appearing in the justice, they allowed the

Cannot commit without summoning the party, and proof of his return.

(1) Rex v. Eleri Cole, 2 Bott, 672. Pl. 729.

 prose-

prosecutor to accept some proposals made by him for amends. (1)

A pauper who returns is inditable

A pauper who returns after removal, without a sufficient justification, may be indicted for disobedience to the order. (2)

May be attached.

Also, if the order be removed into the king's bench, and affirmed there, that court can enforce obedience to it by an attachment.

But it seems from the following case, that the court will compel magistrates to proceed against the party under the statute, although the order of removal has been removed into the king's bench by *certiorari*.

Justices may send pauper returning to the house of correction.

An order of two justices removed a pauper from R. to A., which order was quashed, upon appeal to the sessions; but upon a *certiorari*, into the king's bench, the order of sessions was quashed, and the original order confirmed. The pauper returned of his own accord to R., and the justices doubted whether they had power to send him to the house of correction for returning (3), the first order being removed by *certiorari*. The court of king's bench being moved to grant a rule to enforce the execution of their former rule, directed that the justices should have the former rule of court shewed to them, and the order of the two justices: and if they refused to punish the persons afterwards, then to move the court upon an affidavit of the matter. (4)

(1) Rex v. Angell, Cas. Temp. Hardw. 124

(2) Per Buller, J. Rex v. Kennelworth, ante, 224 (1).

(3) Quære by what statute, unless 13 & 14 Car. II. c. 12. sect. 3?

(4) Rex v. Hall, 5 Mod. 163. 2 Bott, 667. Pl. 726. Quære tamen, see Baldwin v. Blackmore, ante, 223 (1).

SECT.

SECT. XI.

Of the Party's Remedy against an illegal Commitment.

1st, By appeal to the quarter sessions, where he may dispute the legality of the commitment upon its merits, as well as form (1). 2d, By having the commitment, returned it into the court of king's bench, under an *habeas corpus*, where it will be quashed for such defects as appear upon the face of it (2). 3d, By action brought against the magistrates, who have exceeded their jurisdiction by committing him (3). 4th, By motion for a criminal information, where they appear to have acted from malice or corrupt motives. (4)

Remedies against illegal commitment

1 Appeal

2. Quashing it in K B

3 Action.

4. Information.

(1) Rex *v* Hall, ante, 226. (4) and see post title Appeal.

(2) Rex *v* Flere Cole, ante, 225 and see Rex *v* Bowen, 5 Term Rep 156 Rex *v* Reeve, post. 231. (2)

(3) Baldwin *v*. Blackmore, ante, 223. (1).

(4) Rex *v* Angell, ante, 226. (1.

CHAPTER XXX.

Of relieving and ordering the Poor, and first of Maintenance by Relations.

SECT. I.

Division of the Subject.

THERE are certain methods of providing for the poor in ease of the parochial funds, to which the parish officers ought to have recourse in the first instance. 1st, By making particular relations of the impotent poor, contribute to maintain them, if they are of sufficient ability to do so. 2d, By enforcing the maintenance of illegitimate children by their reputed parents. 3d, By putting out apprentices. Where these means are incompetent to the poor's relief, they must apply, 4th, to the general fund raised by the rate. (1)

The statute which regulates the support of poor relations is 43 Eliz. c. 2. s. 7. 11.

The 11 & 12 W. III. c. 4. s. 7., where popish parents refuse to allow their protestant children a maintenance

(1) For the further maintenance of the poor, there are many fines and forfeitures payable to their use, as for swearing, drunkenness, destroying the game, and in many other instances which are to be found in Burn's Justice under their proper titles. And also parts of wastes, woods, and pastures, may be inclosed for the growth and preservation of timber and underwood for their relief, as is set forth in the same book, title *Wood.* See Burn's Just. Poor Rate, sect. 4. p. 5.

suited

suited to their degree, in order to compel them to change their religion, impowers the lord chancellor, or keeper of the great seal, to make an order therein; and 1 Ann. st. 1. c. 30. gives the same power, where protestant children of jewish parents are in the like situation.

But the law compelling the maintenance of relations, as it is to be administered by justices of the peace, depends entirely upon the statute of Elizabeth (1). The subject divides itself as follows: 1st, By whom this relief is to be ordered. 2d, By whom, and in what cases, it is to be given. 3d, Of the order by which they are to be required to relieve, and the means of inforcing it.

SECT. II.

Of the Justices' Jurisdiction to order Relief.

The 43 Eliz. c. 2. enacts that the father, grandfather, mother, and grandmother, and children of impotent poor, *being of sufficient ability*, shall relieve and maintain them, according to that rate, as "by the justices of the county where such sufficient person dwells, at their general quarter sessions, shall be assessed."

The statute ordains this relief only for persons who, from impotence or infirmity, are unable to work, and by no means requires that those who are able to obtain a livelihood by labour, but unwilling to do so, shall be supported by their relations (2). It directs the assess- Must be made by sessions where party domiciled.

(1) Vide Rex *v.* Jacob Mendez de Breta, 1 Ld. Raym. 699.

(2) See Rex *v.* Litton, post. 233. (4). Rex *v.* Gulley, ib. (5).

 ment

ment to be made by the general quarter sessions (1) of the county in which the person inhabits, upon whom it is to be made. If made at any other general sessions it is bad (2). It is the party's residence within their county which gives the magistrates jurisdiction to proceed against him; and if he come there for a temporary purpose, they have no power to make an order.

The defendant was brought to the bar upon a *habeas corpus*. It appeared, by the return, that he was committed by virtue of a warrant from a justice of the peace for the county of Middlesex, because he being *the reputed* grandfather of one B.G. a poor fatherless and motherless child, maintained at the charge of the parish of St. Giles in the Fields, and being also a man of ability, had refused to maintain or provide for the child, or find sureties for his appearance at the next sessions for the county of Middlesex. It was moved to discharge him, because he lived in Suffolk, and came to London, not to reside, but to follow some law-suits, and therefore, the quarter sessions of Middlesex had no power to make an order, the party inhabiting in Suffolk. The Court.—It is very reasonable that he, being of sufficient ability, should contribute to support his grandchild, but he is not compellable to do it by the course which has been taken. The child resides in the parish of St. Giles, in the county of Middlesex, and therefore the contribution must be here, but the party who is to pay it resides in Suffolk. The justices of Suffolk may make an order in this case, and thereby cause the money to be sent from thence to the parish of St. Giles; but the justices of Middlesex have no authority in this case. The court therefore ordered the defendant to be bound over to appear at the next quarter sessions to be

Justices of one county may order the money to be sent to another.

(1) Rex *v.* Charnock, an indictment for disobeying an order made at a *general sessions*, quashed, Comb. 418. Putnal's case, Salk. 476. Rex *v.* Turner, 5 Mod 329.

(2) Ib.

held

held for the *county of Middlesex* (1); and upon his entering into recognizance for that purpose, he was discharged. (2)

The authority of the sessions is original (3), and cannot be delegated to other justices, but they must themselves set the rate (4); and they cannot send poor persons from their own parish to their relation who should maintain them, but ought to make a rate or order of so much a week upon the relation (5). And it seems that they may direct the money to be sent to him into another county. (6) Sessions authority, original

SECT. III.

What Relations may be charged.

IT has been ultimately decided, although the point was originally determined otherwise (7), that the 43 of Elizabeth extends only to natural relations, and not to such as are acquired by marriage. (8)

(1) *Sic in orig.*

(2) Rex *v.* Reeve, 2 Bulst. 344.

(3) Rex *v.* Kempson, 1 Bott, 369. Pl. 419. This order was stated to be made *on the appeal* of the churchwardens, &c. and objected to, because the sessions' jurisdiction is original, and it cannot come before them on appeal. But held well enough, for it is not an appeal from an order, and means only upon application.

(4) Rex *v.* Humphries Style, 154.

(5) Shermanbury *v.* Bolney, Comb. 379. Rex *v.* Jones, Fol. 53.

(6) Rex *v.* Reeve, ante, (2).

(7) Draper *v.* Glenfield, 2 Bulst 345. Custodes *v.* Julies, Style, 283. City of Westminster *v.* Gerrard, 346, 347. Reg. *v.* St. Botolph's Aldgate, Fol. 42.

(8) Rex *v.* Munden, 1 Str. 190. Tubb *v.* Harrison, 4 Term. Rep. 118. Cooper *v.* Martin, 4 East, 76.

A father-in-law, therefore, is under no obligation to maintain his wife's child after the mother's death (1), nor in her life-time (2), although the husband acquire an estate with her (3), nor a father his son's wife or widow (4), neither is a son-in-law bound to maintain his wife's mother. (5)

But it may be made on a grandfather of ability though the father is living, if he be unable. (6)

And the obligation extends only to such relations as are particularly enumerated in the statute (7). An order, therefore, cannot be made upon a man to maintain his wife (8), much less a bastard child. (9)

(1) Reg. *v.* Clentham, Fol. 39.

(2) Rex *v.* Munday, Fort, 303. Tubb *v.* Harrison, ante, 23. (S).

(3) Cooper *v.* Martin, 4 East, 76. Woodford *v.* Lilburn, 1 Bott, 379. Pl. 444.

(4) Rex *v.* Kempson, 1 Bott, 378. Pl. 443. 2 Str. 955. 2 Barnard, 329. 364. Rex *v.* Benoire, ib. 377. Pl. 442. Reg. *v.* Dunn, ib. 376. Pl. 479. and see Rex *v.* Tripping, 16 Vin. Abr. 424.

(5) Rex *v.* Munday, Fort. 306. Although his wife is joined in the order, and he had considerable effects with her: for the son-in law is not within the act, and the wife cannot be of ability, because her estate is a gift to the husband, and he is a purchaser for a valuable consideration.

(6) Reg. *v.* Joyce, 16 Vin. Abr. 423.

(7) Yet quære, whether grandchildren are not compellable by this act to maintain their grandfather or grandmother? The statute requires the grandfather and grandmother to relieve, but omits grandchild, unless it is comprehended under the word "children." But see Walton *v.* Sparks, Cas. of Sett. 210.

(8) Reg. *v.* Davison, 11 Mod. 268.

(9) Budwath *v.* Dumply, Salk. 123. Per Croke and Whitlock, J. City of Westminster *v.* Gerrard, 2 Bulst. 346.

SECT.

Form of the Order of Maintenance, and Punishment for disobeying it.

THE order must state, 1st, That the person upon whom it is made lives within the jurisdiction of the justices who make it (1). 2d, It must adjudge the party upon whom it is made to be of sufficient ability (2). 3d, That the person to be relieved is actually chargeable to the parish (3). 4th, That they are impotent (4), or unable to work (5); and this should be done as matter of adjudication, and not of recital (6). 5th, It must direct and require the defendant to relieve the pauper; a mere recommendation is insufficient (7). 6th, It must state for how long the maintenance is to continue. An indefinite order to pay 2s. 6d. a week is void (8). But if it direct him to pay until the court shall order to the contrary, it seems sufficiently definite. (9)

(1) Rex *v.* Woodford, 1 Bott, 371. Pl. 427. and held that, if the first order is bad on this account, it is not helped by a recital in the second, that the parties are then living within their jurisdiction.

(2) Rex *v.* Hallifax, ib. 370. Pl. 422.

(3) Rex *v.* Tripping, 19 Vin. 424, where a recital of the overseers' complaint to that effect, held insufficient. See also Rex *v* Jacob Mendez de Brata, 1 Ld. Raym. 699. Yet quære whether it would not be sufficient to adjudge him likely to be chargeable? See Raym. 199.

(4) Rex *v.* Litton, Sett. Poor, 111.

(5) Rex *v.* Gulley, Fol. 47.

(6) Rex *v.* Pennoyer, 1 Bott, 371. Pl. 426. See ante, 188. the form of an order of removal, and of an order of bastardy, post.

(7) Rex *v.* Pennoyer, ante, (6). But without argument.

(8) Ib. see the opinion of Lord Ellenborough, C. J. Stable *v.* Dixon, 6 East, 171.

(9) Jenkin's case, 2 Salk. 531. Rex *v.* Gulley, ante, (5).

It

May have retrospect.

It is decided that this species of order may have a retrospect. An order that the grandfather should keep the grandchild, the father being living, and unable to do it (1), and also to pay so much more money for the time past, while he was chargeable, as well as for the time to come, was confirmed. (2).

It seems to remain undecided, how far several relations, who are of sufficient ability, can be compelled at the same time, to contribute to the pauper's support, by a joint, or by several orders. (3).

But a relation of sufficient ability may be ordered to contribute to the support of several children of one family by the same order. (4)

On whose application.

This order may be made as well on the application of the indigent persons as of the parish officers: and when a sum is directed to be paid weekly, it is due at the commencement of the week. (5)

Punishment, 43 Eliz.

By indictment.

The 43 Eliz. enacts a specific penalty of 20s. a month for disobedience to the order; which was, doubtless, more than sufficient to maintain a poor person at the time when that statute passed. But it has been since held, that notwithstanding the statute inflicts a particular punishment, and prescribes a specific method to recover the penalty, the party may be indicted at common law for disobeying the order. (4)

(1) Quære, if this is not to be understood by paying a weekly allowance. See Shermanbury *v.* Bolney, and Rex *v.* Jones, ante, 231. (5).

(2) Reg. *v.* Joyce, 16 Vin. Abr. 423.

(3) It seems from the wording of 43 Eliz. c. 2. s. 7. as if the relations enumerated were all liable.

(4) See Rex *v.* Robinson, Burr. Rep. 799. Rex *v.* Commins, 5 Mod. 179. post.

(5) Rex *v.* Fearnly, 1 Term Rep. 316. see post.

SECT.

SECT. V.

Of the Remedy against illegal Orders upon Relations.

As the power to make these orders is vested exclusively in the quarter sessions by statute, there can be no appeal to that jurisdiction. The chief remedy, therefore, is by removing the order into the court of king's bench, which, unless a case is stated, can only quash for such defects as appear upon the face of it. No appeal.

If, however, the magistrates have exceeded their authority in making the order, the party may refuse obedience; for, if illegally made, that is a good defence against an indictment for disobeying it; and if the penalty given by the 43 Eliz. is sought to be recovered, in such a case the defendant may contest it by bringing an action for the illegal distress.

CHAPTER XXXI.

Of compelling Parents to maintain their Family. (1)

No order under 43 Eliz. c. 2. upon husband to maintain his wife.

IT has been already shown, that an order cannot be made upon an husband, directing him to maintain his wife, under 43 Eliz. c. 2. (2)

The legislature has enacted more severe penalties against those who desert their families, by the following statutes:—

7 Jac. 1. c. 4. s. 8. Persons running away, and leaving their children chargeable, deemed incorrigible rogues.

Threatening to run away to be treated as sturdy wandering rogues.

By 7 Jac. I. c. 4. s. 8. People able to labour, running away out of their parish, and leaving their families upon the parish, shall be taken and deemed incorrigible rogues. And if they threaten to run away, and leave their families as aforesaid, the same being proved by two sufficient witnesses upon oath, before two justices of peace, the persons so threatening shall, by the said two justices of peace, be sent to the house of correction (unless he or she can put in sufficient sureties for the discharge of the parish), there to be dealt with, and detained as a sturdy and wandering rogue, and to be delivered at the said assembly or meeting, or at the quarter sessions, and not otherwise.

But the statute only inflicted personal punishment upon those who deserted their families. It became necessary therefore, to provide a further remedy for this inconvenience, and devise some method for maintaining the

(1) As to the compelling Catholic or Jewish parents to maintain their Protestant children, see ante, chap. XXX. sect. 1. An order may be made upon a father, to maintain his child, by the express words of 43 Eliz. c. 2.; but quære, if this can be until after it has ceased to be *part of his family?*

(2) Reg. v. Davison, ante, 232. (8).

deserted

deserted families out of that substance which the fugitive has left behind.

This was accomplished by 5 Geo. I. c. 8. s. 1. The churchwardens, or overseers of the poor of a parish or place, where any wife, or child, or children, shall be *left* chargeable, may, by warrant, from any two justices, seize so much of the goods and chattels, and receive so much of the annual rents and profits of the lands and tenements, of such husband, father, or mother, as such two justices shall order, for or towards the discharge of such parish or place, for the bringing up and providing for the same; which warrant or order being confirmed at the next quarter sessions, they, the justices of such quarter sessions, may make an order for the churchwardens or overseers for the poor of such parish or place, to dispose of such goods and chattels by sale, or otherwise, or so much of them, for the purposes aforesaid, as the court shall think fit; and to receive the rents and profits, or so much of them, as shall be ordered by the sessions as aforesaid, of his or her lands and tenements, for the purposes aforesaid.

5 Geo. I. c. 8. s. 1. Churchwardens, &c. by warrant of two justices, may seize the offender's goods, &c.

and by order of quarter sessions, dispose thereof.

The justices are not authorized by this act to empower the parish officers to seize the entire property of the person who leaves his wife chargeable, when a part will be sufficient to relieve the parish.

A sufficiency only to be taken.

The original order, therefore, by the two justices, ought to specify the sum to be raised; because the declared intention of the act is, that so much should be taken as the justices should think fit, meaning that they should exercise their discretion upon the amount to be taken. This order should also specify how much property is to be seized, and then the order of sessions should state

Form of or

state how much of the property seized is to be sold or appropriated. (1)

Must be retrospective.

It seems also as if they could not make a prospective order for the family's future maintenance. The language of the act is, that the goods and chattels, rents and profits, are to be taken for, or towards *the discharge* of the parish, which imports that it is to relieve the parish from a burthen already incurred, and which is therefore capable of being ascertained. (2)

Case.

One Stable being possessed of a messuage and farm in the parishes of B. and W. demised them at an annual rent of 18l. 10s., and afterwards quitted his abode in C. leaving his wife chargeable to the parish of C. The overseers of C. applied to two justices of the county, who, in pursuance of the statute, made their warrant or order, &c. whereby, after reciting (in substance) that it appeared to them, "as well on the complaint, &c. as on due proof, on oath, that the said S. had gone away from his place of abode at C. &c. into some other county or place, and had left D. S. his wife chargeable to the said parish, the place of their last legal settlement, and that the plaintiff had some estate, whereby to ease the said parish of the said charge, in whole or in part, they the said justices thereby authorised and commanded them the churchwardens and overseers, &c. of C. *to receive the annual rents and profits of the lands and tenements of the said* S. *at* B. in the parishes of B. and W. in the said county, *for and towards the discharge of the said parish of* C. *for the providing for the wife of said* S., and that, with the said warrant, they the said churchwardens and overseers should appear at the next quarter sessions for the county, and certify then and there what they should have done in

(1) Per Lawrence, J. Stable *v.* Dixon, 6 East, 172.

(2) Per Lord Ellenborough, C. J. ib.

execution

execution of the said warrant. This order was confirmed by the court at the next quarter sessions, *and the court did then and there order the said churchwardens and overseers, &c. to receive* 7l. 16s. *rent, of the rents and profits of the lands and tenements of the said* S. *at* B. *in the parishes of* B. *and* W." The parish officers received under these orders one sum of 7l. 16s. on 1st Oct. 1801, and another on 25th March 1802. S. having returned to C. and disputing this last payment made by his tenant, brought an action of covenant against him for the entire rent of the last year.

The tenant pleaded payment of the last 7l. 16s. parcel of the second year's rent under this order. But the court were of opinion, that he could not discharge himself thereby, and gave judgment against him. The original order was bad, as it directed an indefinite seizure of the fugitive's property; and it was very questionable whether it could be made good by the subsequent order of confirmation at sessions, which limited the sum to be taken at 7l. 16s. But supposing that it could be thereby legalized, still this last order went either to direct an annual payment of 7l. 16s. or one specific sum to that amount. If the first, it was clearly indefinite and bad, so that no payment by the tenant under it could be justified. If it directed only one definite sum of 7l. 16s. to be taken, which the court seemed to consider to be the meaning of the order, it was satisfied by the first payment, and could not authorize the second. (1)

A tenant may dispute this order.

It seems from this case, that the tenant of the premises should enquire into the validity of the orders which are to enable the parish officers to receive his rent before he pays it to them, or he may otherwise be liable to pay it a second time to the landlord upon his return. If the

(1) Stable v. Dixon, 6 East, 163.

order

order be illegal, he may refuse payment, and if indicted for disobedience, he may defend himself, or he may bring an action of trespass if his goods are distrained; for he is not concluded by an order, to which he is no party, from shewing that it is illegal. (1)

5 Geo. I. c. 8. s. 2. Churchwardens accountable for the monies so received.

By 5 Geo. I. c. 8. s. 2. The churchwardens and overseers aforesaid, shall be accountable to the justices at the quarter sessions, for all such money as they, or any of them, shall receive, by virtue of this act.

17 Geo. II. c. 5. s. 1. Persons threatening to leave their wives or children, may be sent to the house of correction for one month, as idle and disorderly.

By 17 Geo. II. c. 5. s. 1. Persons who threaten to run away, and leave their wives or children to the parish, shall be deemed idle and disorderly persons; and any justice of the peace may commit such offenders (being thereof convicted before him by his own view, their own confession, or by the oath of one witness,) to the house of correction, there to be kept to hard labour, for any time not exceeding one month.

Sect. 2. Persons who shall run away, and leave their families chargeable to the parish.

By sect. 2. All who run away, or leave their wives or children, whereby they become chargeable to any parish or place shall be deemed rogues and vagabonds. And the justice or justices of the peace, before whom they shall be brought, may order them to be publicly whipt, or sent to the house of correction, to remain till the next quarter sessions, or any less time they shall think proper; and, if they think convenient, they may afterwards pass them.

Sect. 4. What persons deemed incorrigible rogues.

By sect. 4. Persons apprehended as rogues and vagabonds, and escaped from those who apprehended them, or refusing to go before a justice to be examined, or to be conveyed by a pass, or knowingly giving a false account of themselves on the examination, after warning given them of their punishment; and all rogues and vagabonds who

(1) Per Lawrence, J. Ea. 17.

shall

shall break or escape out of any house of correction, before the expiration of the term for which they were committed; and all persons who, after having been punished as rogues and vagabonds, and discharged, shall again commit the said offence, shall be deemed incorrigible rogues.

Sect. 9. Where any offender against this act shall be committed, as aforesaid, to the house of correction, there to remain until the next general or quarter sessions; and the justices at such sessions shall, on examination of such circumstances of the case, adjudge such person a rogue or vagabond, or an incorrigible rogue; they may, if they think convenient, order them to be detained, and kept in the said house of correction to hard labour, for any further time not exceeding six months; and such incorrigible rogue for any further time not exceeding two years, nor less than six months, from the time of making such order of sessions; and, during the time, to be corrected by whipping, in such manner, times, and places, within their jurisdiction, as they, in their discretion, shall think fit.

Sect. 9. If the justice commit such offender till the sessions, and he shall be there adjudged a vagabond or incorrigible rogue, they may imprison such vagabond for six months and such incorrigible rogue for two years.

Sect. 9. Such person may (if the justices at the said sessions shall think convenient) afterwards be passed, as aforesaid: and being a male, if above the age of twelve years, the justices at the sessions may, at any time before he is discharged, send him to be employed in his majesty's service, either by sea or land.

Sect. 9. Sessions may send male offenders into his majesty's service.

Sect. 9. In case any incorrigible rogue, so ordered by the said general or quarter sessions to be detained and kept in the said house of correction, shall, before the expiration of the time for which he was ordered to be detained, break out, or escape from the house of correction, or shall offend again in like manner; every such person shall be taken and deemed guilty of felony, and, being legally

Sect. 9. If any incorrigible rogue escape from the house of correction, he shall be a felon, and transported for seven years.

legally convicted, shall and may be transported for any time not exceeding seven years.

Sect. 26 Appeal.

Sect. 26. Any person aggrieved by any act of any justice out of sessions, in or concerning the execution of this act, may appeal to the next general or quarter sessions, giving reasonable notice thereof; whose order shall be final.

32 Geo. III. c. 45. s. 8.

By 32 Geo. III. c. 45. s. 8. it is enacted, That if it shall be made appear to any two justices, that any poor person shall not use proper means to get employment, or, if he is able to work, by his neglect of work, or by spending his money in ale-houses or places of bad repute, or in any other improper manner, shall not apply a proper proportion of the money earned by him towards the maintenance of his wife and family, by which they, or any of them, shall become chargeable to their parish or township, he shall be considered as an idle and disorderly person, and be subject to such punishment as is directed for idle and disorderly persons by the aforesaid act.

Soldier no vagrant

It has been determined, upon 17 Geo. II. c. 5. that a common soldier, separating himself from his wife and family in the discharge of his duty, and billeted elsewhere, cannot be considered as a vagrant within the act. (1)

Power of sessions.

And where a person is convicted as a rogue and vagabond, under 17 Geo. II. c. 5. by a single justice, and is committed by him until the next sessions, &c. the court of quarter sessions may adjudge him to be a rogue and vagabond, and to be further imprisoned and kept to hard labour for six months, and to be publicly whipped during that time.

(1) The Soldier's case, 1 Wils. 331.

It

It was doubted whether they could also, in addition, adjudge a male, if above the age of twelve, to be employed in His Majesty's service by sea or land, it being argued that this clause applied only to incorrigible rogues. But the Court were of opinion, that the words "such person" referred to any offender against the act, and therefore, as well to a rogue and vagabond, as to an incorrigible rogue. For, if the words "*such person* being a male," &c. which occur in the latter part of the clause, are to be referred to an incorrigible rogue only, there will be no provision made for the passing of a rogue and vagabond by the sessions after his imprisonment, which the evident intention and policy of the act require in order to prevent vagrancy. (1)

May send a rogue and vagabond to serve by sea or land.

All commitments under the vagrant act are commitments in execution: if one be for safe custody only, it is bad (2). This seems clear from the option given to the committing magistrate as to the punishment to be inflicted; as he is either to order the party to be whipped, or to commit him till the next sessions, or for a shorter period. Now, in two of these instances (3), it is properly admitted, that there must be a conviction of the offence to warrant the sentence; and there seems to be no reason why it should not also extend to the third instance, the legislature not having made any distinction between them. And as there might exist cases in which an imprisonment beyond the next sessions is necessary, power is given to the magistrates to commit the offender to the next session, who may increase the punishment, if they think proper. (4)

They are commitments in execution.

(1) Rex *v.* Patchett, 5 East, 339. and they must ascertain, in their adjudication, whether he is to serve in the land or sea service, or it will be bad.

(2) Rex *v.* Brooke, 2 Term Rep. 190. Rex *v.* Alder, ibid. Rex *v.* Rhodes, 4 Term Rep. 220.

(3) Whipping and imprisonment for a shorter period than until the sessions.

(4) Per Buller, J. Rex *v.* Rhodes, ibid.

Form of commitment.

A warrant, therefore, of commitment under this act, must be preceded by a conviction of the offence. It must consequently state the party to be convicted of the offence imputed; and if it states him only to be charged with it, that is insufficient. Also, if it commits him till the next sessions, it should add, "or until discharged by due course of law." (1)

Appeal and certiorari.

An appeal lies to the quarter sessions from any orders made by the justices out of session under the statute (2); and all such orders may be removed by *certiorari* into the court of king's bench. (3).

(1) Rex v. Rhodes, 4 Term Rep. 220.

(2) 17 Geo. II. c. 25. s. 6.

(3) Rex v. Patchett, ante, 243

CHAPTER XXXII.

Of Bastards.

SECT. I.

Of the Statutes concerning Bastards.

WHO are bastards, and the species of evidence to establish illegitimacy, are subjects which have been discussed in treating of their settlement. (1)

The present investigation respects only the methods by which the parish may be exempted from the charge of maintaining them.

The statutes by which they are enabled to do so are; 18 Eliz. c. 3. s. 2. which recites, that bastards begotten and born out of lawful matrimony, are now left to be kept at the charge of the parish where they are born, to the great burden of the same parish, and in defrauding of the relief of the impotent and aged true poor of the same parish; and enacts, That any justices of the peace (whereof one to be of the quorum in or next unto the limits where the parish church is, within which parish such bastard shall be born), upon examination of the cause and circumstance, shall and may, by their discretion, take order, as well for the punishment of the mother and reputed father of such bastard-child, as also for the better relief of every such parish, in part or in all.

Any two justices, in or next to the parish where a bastard is born, may examine the matter, and make an order of bastardy.

(1) Ante, Vol. i. chap. xiv.

Sect. 2.

The justices may make an order of maintenance.

Sect. 2. And the said justices shall and may likewise, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly, or other sustentation for the relief of such child, in such wise as they shall think meet and convenient.

The father or mother of a bastard child may be committed for disobeying the justices' order; but the order must be in the alternative, to give security, or to appeal at the sessions.

Sect. 2. If after the same order by them subscribed under their hands, any of the said persons, viz. mother or reputed father, upon notice thereof, shall not for their part observe and perform the said order, that then, every such party so making default in not performing of the said order, to be committed to ward to the common gaol, there to remain without bail or main prize, except he, she, or they, shall put in sufficient surety to perform the said order, or else personally to appear at the next general sessions of the peace to be holden in that county where such order shall be taken; and also, to abide such order as the said justices of the peace, or more part of them, then and there shall take in that behalf (if they then and there shall take any); and that if at the said sessions the said justices shall take no other order, then to abide and perform the order before made, as is aforesaid.

49 Geo. III. c. 68.

Charges and costs payable by the father.

By 49 Geo. III. c. 68. s. 1. after reciting that the provisions of 18 Eliz. are inadequate to the purposes of indemnifying parishes against the charges and expences incurred by the apprehending and securing the reputed father, and also by obtaining the order of filiation, and that it is expedient that such charges and expences should be borne by the adjudged reputed father of such bastard child or children, at the discretion of the justices by whom such adjudication shall be made, either in the court of quarter sessions or otherwise, enacts, that every person who shall thereafter be adjudged to be the reputed

reputed father of any bastard child or children, shall be chargeable with and liable to the payment of all reasonable charges and expences incident to the birth of such bastard child or children, as also to the payment of the reasonable costs of apprehending and securing such reputed father, and also to the payment of the costs of the order of filiation, such costs of apprehending and securing the father, and of the order of filiation not to exceed the sum of 10l.; and all such charges, expences, and costs shall be duly ascertained before the justices of the peace, or the court of quarter sessions, making such order of filiation.

By 7 Jac. I. c. 4. s. 7. And because great charge ariseth upon many places within this realm by reason of bastardy, be it enacted, that every lewd woman which shall have any bastard, which may be chargeable to the parish, the justices of peace shall commit such lewd woman to the house of correction, there to be punished, and set on work during the term of one whole year; and if she shall eftsoons offend again, that then to be committed to the house of correction as aforesaid, and there to remain until she can put in good sureties for her good behaviour not to offend so again. (1)

The justices may commit the mother of bastard children to the house of correction.

By 3 Car. I. c. 4. s. 15. so much of the 18 Eliz. c. 2. as concerneth bastards begotten out of lawful matrimony is continued; with this, that all justices of the peace within their several limits and precincts, and at their several sessions, may do and execute all things concerning that part of the said statute, that by justices of the peace, in the several counties, are by the said statute limited to be done.

The session shall have the same authority, in [illegible] of bastards [illegible] as are [illegible] to justices of peace.

By 13 & 14 Car. II. c. 12.* s. 19. And whereas the putative fathers and lewd mothers of bastard children run away

Putative fathers of bastard chil-

(1) Repealed by 50 Geo. III. c. 51.

dren, how to be proceeded against.

away out of the parish, and sometimes out of the county, and leave the said bastard children upon the parish where they are born, although such putative father and mother have estates sufficient to discharge such parish, be it enacted, that it shall and may be lawful for the churchwardens and overseers for the poor of such parish, where any bastard child shall be born, to take and seize so much of the goods and chattels, and to receive so much of the annual rents or profits of the lands of such putative father or lewd mother, as shall be ordered by any two justices of peace as aforesaid, for or towards the discharge of the parish, to be confirmed at the sessions, for the bringing up and providing for such bastard child: and thereupon it shall be lawful for the sessions to make an order for the churchwardens and overseers for the poor of such parish to dispose of the goods by sale or otherwise, or so much of them, for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits, or so much of them as shall be ordered by the sessions as aforesaid, of his or her lands. (1)

Persons sued for matters in this act, may plead the general issue.

By 13 & 14 Car. II. c. 2. s. 20. And if any person or persons shall be sued for any matter or thing which he shall do in execution of this act, he may plead the general issue, and give the special matter in evidence; and if the verdict shall pass for the defendant, or if the plaintiff be nonsuited, or discontinue his suit, the defendant shall recover treble damages.

6 Geo. II. c. 31.

By 6 Geo. II. c. 31. s. 1. "If any single woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable to any parish or extra-parochial place, or shall declare herself to be with child, and that such child is likely to be born a

(1) See 5 Geo. I. c. 8. ante.

bastard,

bastard, and to be chargeable to any parish or extra-parochial place, and shall in either of such cases, in an examination to be taken in writing upon oath before any one or more justices of the peace of any county, &c. wherein such parish or place shall lie, charge any person with having gotten her with child, it shall and may be lawful for such justice or justices, upon application made to him or them by the overseers of the poor of such parish, or any one of them, or by any substantial householder of such extra-parochial place, to issue out his or their warrant or warrants for the immediate apprehension of such person so charged as aforesaid, and for bringing him before such justice or justices, or any other of His Majesty's justices of such county, &c.; and the justice or justices before whom such person shall be brought, is and are hereby authorized and required to commit the person so charged to the common gaol or house of correction of such county, &c. unless he shall give security to indemnify such parish or place, or shall enter into a recognizance, with sufficient surety, to appear at the next general quarter sessions of the peace to be holden for such county, and to abide and perform such order or orders as shall be made, in pursuance of an act passed in the eighteenth year of Her late Majesty Queen Elizabeth, concerning bastards begotten and born out of lawful matrimony."

But by 49 Geo. III. c. 68. s. 6. so much of 6 Geo. II. c. 31. as authorizes the justice or justices before whom the reputed father of a bastard child shall be brought, in cases where the woman has not been delivered, to commit such reputed father to the common gaol or house of correction, unless he shall give security to indemnify the parish or place, or shall enter into a recognizance with sufficient surety upon condition to appear at the next 49 Geo. III. c. 68. s. 6.

next general quarter sessions, or general sessions of the peace, is repealed.

Sect. 2. By the same act, sect. 2. It is enacted, that if any single woman shall declare herself with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, township, or extra-parochial place, and shall in an examination to be taken in writing upon oath, before any justice of the peace of any county, riding, division, city, liberty, or town corporate, wherein such parish, &c. shall lie, charge any person with having gotten her with child, it shall be lawful for such justice upon application made to him by the overseer of the poor of such parish or township, or by any substantial householder of such extra-parochial place, to issue out his warrant for the immediate apprehending of such persons so charged as aforesaid, and for bringing him before such justice, or before any other justice of the peace of such county, &c.; and the justice before whom such person shall be brought, having authority in this behalf, is hereby authorized and required to commit the person so charged to the common gaol or house of correction of such county, &c. unless he shall give security to indemnify such parish or place, or shall enter into a recognizance with sufficient surety or sureties, upon condition to appear at the next general quarter sessions or general sessions of the peace, to be holden for such county, &c. to abide and perform such order or orders as shall then be made in pursuance of the 18th of Eliz., unless one such justice as aforesaid, shall have certified in writing under his hand, to such general quarter sessions, or general sessions of the peace, that it had been proved before him upon the oath of one credible witness, that such single woman had not been then delivered, or had been delivered within one month only, previous to the day on which

such general quarter sessions, or general sessions of the peace shall be holden, or unless two justices of the peace of such county, &c. shall have certified in writing under their hands, to the next, or when such woman shall not have been delivered as aforesaid, then to the immediately subsequent general quarter sessions or general sessions of the peace, that an order of filiation had been already made on the person so charged, or that such order was not then requisite to be made on account of the death of the child born a bastard, or for other like sufficient reason: in each of which cases firstly before-mentioned it shall and may be lawful for the justices assembled at such general quarter sessions, or general sessions of the peace, to respite such recognizance to the then next general quarter sessions or general sessions of the peace, to be holden for such county, &c. without requiring the personal attendance of the putative father so bound, or that of his surety or sureties, and in either of the two last-mentioned cases, it shall be lawful for the justices assembled as aforesaid, wholly to discharge such recognizance.

Sect. 3. after reciting that parishes are put to great expence by enforcing the performance of orders of maintenance made on the filiation of bastard children, enacts, that if any reputed father or mother of such bastard child or children, on whom any order of filiation or maintenance of such child or children, shall have been made by the court of quarter sessions, or which shall have been made by two justices of the peace, and confirmed by the court of quarter sessions, or against which no appeal shall have been made to the court of quarter sessions, shall neglect or refuse to pay any sum or sums of money which he or she shall have been ordered to pay towards the maintenance or other sustentation for the relief of any such bastard child or children by Sect. 3.

by any such order, it shall be lawful for any justice of the peace of the county, &c. in which such reputed father or such mother shall happen to be, and the said justice is hereby required upon complaint made to him by any one of the overseers of any parish, &c. liable to the maintenance or support of such bastard child or children, *or where such bastard child or children shall then be*, and upon proof on oath of such order for the payment of such sum or sums of money, and of such sum or sums of money being unpaid, and of a demand of such payment having been made, and a refusal to pay the same, or that such reputed father or such mother hath left his or her usual place of abode, and hath avoided a demand thereof being made by such overseer, to issue his warrant to apprehend such reputed father or such mother, and to bring him or her before such justice, or any other justice of the peace of the same county, &c. to answer such complaint; and if such reputed father or such mother, shall not pay such sum or sums of money as shall appear to the said justice, before whom such reputed father or such mother shall be brought to be due and unpaid, or shall not shew to such justice some reasonable and sufficient cause for not so doing, it shall be lawful for such justice, and the said justice is hereby required to commit such reputed father or such mother to the public house of correction, or common gaol of the said county, to be there kept to hard labour for the space of three months, unless such reputed father or such mother shall before the expiration of the said three months, pay or cause to be paid to one of the overseers of the poor of the parish, township, or place on whose behalf such complaint as aforesaid was made, the said sum or sums of money so due and unpaid as aforesaid, and so from time to time as often as such reputed father or such mother shall in manner aforesaid neglect or refuse to pay any other sum or sums of money

that

that shall afterwards become due by virtue of and under such order, after the expiration of, or discharge from any such former imprisonment.

Sect. 4. provides that all such charges, expences, and costs shall be wholly at the discretion of the justices or court of quarter sessions, who shall make the order of filiation, who are authorized to allow and order payment of the whole or part thereof: Provided that the costs of apprehending and securing the reputed father, and of the order of filiation shall not in any case exceed 10l., and for securing due payment of the same, after such allowance and order, all and every the powers, authorities, provisions, clauses, matters, and things contained in the 18th of Eliz. shall be respectively observed, used, and practised in the execution of this act, and shall be taken to apply as fully and effectually to all intents and purposes as if herein specially recited and re-enacted. Sect. 4.

SECT. II.

General Objects of 18 Eliz. c. 3. *&c. and to whom they apply.*

It was formerly doubted whether the 18 Eliz. c. 3. extended to the case of a bastard begotten upon a married woman whose husband was living. For the words of the statute are, "bastards begotten and born out of lawful matrimony," which do not seem to comprehend in their literal sense, the illegitimate issue of a married woman (1). But it is now settled, that cases of this kind are within the act. (2). Provisions 18 Eliz. c. 5. extend to bastards of married women.

(1) Rex *v.* Alberton, 2 Salk. 483. 1 Lord Raym. 395. Alanson *v.* Spence, 5 Mod. 419.

(2) Ibid.

There-

Therefore where an illegitimate child is charged to have been begotten upon a married woman, the justices need not enquire whether the husband is alive or not, provided his non-access be distinctly proved. (1)

As do those of 6 Geo. II. & 49 G. III.

The provisions of 6th Geo. II. were likewise held to extend to the bastard children of married women, notwithstanding that the act refers only to the case of "a single woman" delivered of a bastard. For *Per* Lord Ellenborough, C. J. "This question, which arises on the wording of the statutes of Elizabeth and George II. in effect resolves itself into the question, whether the child is a bastard. For when the question is, whether this was a child born out of lawful matrimony, that is, out of the limits and rights belonging to that state, it is the same in substance as the question, whether it be a *bastard*. It is so for the general purposes of the act. The matrimony does not cover the child if it be in other respects (according to the rule of law applicable to this subject) a bastard. And so it seems, that a child born by adulterous intercourse, is as much within the provision of the act of George II. as one which is born of a single woman. The cases of the King *v.* Reading, and the King *v.* Bedall, were both after the statute of George II. and yet no objection was taken. It is a consequence which follows of course, from establishing the bastardy of the child, that it was *born out of lawful matrimony*, in the proper sense of the words, as applied to the subject matter." (2)

The

(1) Rex *v.* Bedall, 2 Str. 1076. Cas. Temp. Hard. 379. Andr. 8. S. C. and see ante, vol. i. 294. and seq.

(2) Rex *v.* Luffe, 8 East, 204. The words of 35 Geo. III. c. 101. sect. 11. enact only, that every *unmarried* woman, with child, shall be deemed a person actually chargeable, and removeable as such to her place of settlement. But this has been likewise held to extend to the case of a married woman pregnant of a child

which

The object of these acts, as well as the remaining statutes upon this subject, is threefold: 1. To secure the reputed father being forth coming to answer to an order of filiation and maintenance when made upon him. 2. To exempt the parish from the burthen of maintaining the bastard by means of such an order upon the parents. 3. For the punishment of the parents.

SECT. III.

Of securing the reputed Father previous to the Birth of the Child.

Objects of 6 Geo. II.

PRIOR to 6 Geo. II. every justice, at his discretion, might bind to his good behaviour *any person charged or suspected* to have begotten a bastard, that he might be forthcoming when the child should be born, and the like might be done after the child's birth, and before an order made under 18 Eliz. chap. 3.(1). One object of 6 Geo. II. therefore, was to restrain justices from proceeding, on the application of lewd women pretending to be with

1. To confine proceedings to complaints by parish officers.

which when born would by law be a bastard. For per Lord Ellenborough, C. J. "The legislature plainly had in "view that everywoman pregnant of a "child, which was not protected by "the matrimony of its parents, but "would when born be a bastard, "should be removable whether mar-"ried or unmarried." Rex *v.* Tibbenham, 9 East, 388. ante. 183. 49 Geo. III. c. 6[illegible] sect. 2. is confined in its expression to "any single woman."

(1) It is thus laid down by Lambard, "and therefore it shall not be amiss at this day (in my slender opinion), to grant surety of the good abearing, [i. e. behaviour] against him that is suspected of having begotten a bastard child; to the end that he may be forthcoming when it shall be born: for otherwise there will be no putative father found, when that the two justices of peace shall, (after birth and by virtue of the statute 18 Eliz. c. 3., come to take order for his punishment)." Eiren. book. 2. chap. 2. p. 122. S. P. Per Twisden, J. Assent. Cur. Rex *v.* Brown, 3 Keb. 108. See also Dalton, chap. 11. tit. Bastardy, Cromp. 196.

child,

child, &c. till complaint by the churchwardens, &c. (1). The act therefore directs the order to be made upon application by the overseers of the poor. (2)

2. To indemnify the parish.

The second object of that statute was for more effectually indemnifying the parish from expence, &c. (3), by giving it a more prompt remedy for securing the putative father, and better security for his future appearance to answer to an order of filiation.

Where parishes are united under 22 Geo. III. c. 83. the guardian thereby appointed is substituted in the overseer's place, and one who is *de facto* such, being so received and acknowledged by the parish, though not legally appointed, is competent to apply in that character to a justice of the peace to take the examination of a single woman pregnant with child, in order to filiate the bastard. (4)

Object of 49 Geo. III. c. 68.

As the 49 Geo. III. c. 68. adopts the language of the 6 Geo. II. it seems intended in furtherance of the same purposes, and the alterations which have been made in the law by that statute, will be pointed out under the proper heads.

Justices jurisdiction.

The jurisdiction to inquire into this complaint is confined to the justices of the county or place within which the parish or place to which the child is likely to be chargeable is situated (5) and the mother, with

(1) Per Foster, J. Rex *v.* Fox, 1 Bott, 472. Pl. 190.

(2) Rex *v.* St. Mary's Nottingham, East, 10 Geo. II. Ford's MSS. 13 East, 57.

(3) Eod. Jud. Rex *v.* Fox, ante, 1.

(4) That is for proceedings against the putative father under 49 Geo. III. c. 68. Rex *v.* St. Martyr, 13 East. 55.

(5) Rex *v.* St. Mary Nottingham, ante, (2).

 the

the concurrence of the parish officers, may make the charge.

The mother may make this declaration at any time, after she discovers that she is with child. But she cannot be *compelled* to answer questions relative to her pregnancy before delivery, nor can she be sent for against her will, and examined by the justice, until one month after. (1)

When declaration to be made by the mother, under 6 Geo. II

It is laid down by Dalton, that any justice may bind those who procure the putative father, or the mother, to run away,(so that an order cannot be made or performed,) to their good behaviour, to be forthcoming at the next general gaol delivery or quarter sessions (2). But it is said that no other person than the mother, such as a nurse, &c. is compellable to disclose the father's name, or to give security to the parish. (3)

Of secreting the woman &c

It seems as if proceedings before a magistrate, under 6 Geo. II. and that which now takes place under 49 Geo. III. may be altogether *ex parte*. No summons need issue to bring the person accused before the justice, and it appears unnecessary that he should be present at the woman's examination. They may thus resemble the power of holding to bail by affidavit in a civil action, so that if the examination be sufficient to charge the supposed father, the

Proceeding under 6 Geo. II.

(1) 6 Geo. II. c. 31. s. 4. But see 35 Geo. III. c. 101.

(2) Quære, whether it be an offence to secrete the woman, with her own consent, in order to prevent her giving evidence about the father, for there is no power to compel her to be examined before her delivery. Rex *v.* Chandler, 1 Str. 612. 2 Ld. Raym. 1368. 1 Bott, 468. Pl. 583. But the ground of demurrer was an averment, that the woman "was big with an illegitimate child," which cannot be, for no child is illegitimate until after the delivery, as the law contemplates that, by an intervening marriage of the parents, it may be born in lawful wedlock.

(3) Rex *v.* Southby, 1 Bott, 472. Pl. 589. But query whether they are not compellable to give evidence before the justices making an order of filiation.

Where reasonable grounds are stated to shew that he is likely to run away if apprized of the charge by a previous summons.

justice or justices should issue a warrant to apprehend him (1). This warrant is not like a writ issuing out of the civil courts, in being returnable at a certain period, after which time its authority ceases. It continues in force until it is fully executed and obeyed; before that is done, the party may be arrested under it at any time, however distant, during the magistrate's continuance in the commission by whom it was granted. Where, therefore, the putative father of a bastard had been arrested under a warrant, and agreed to give a bond of indemnity, with two sureties, but one of the parties not executing the bond, he was arrested a second time under the same warrant, it was held legal. (2)

Proceedings when person charged appears.

When the reputed father is brought by warrant before the justice, the magistrate has no power to examine into the merits of the case, but is bound by the express terms of the statute to commit him to the common gaol or house of correction, unless he gives security to indemnify the parish, or enters into a recognizance, with sufficient surety, to appear at the next sessions, &c. and abide and perform such order or orders as shall be made in pursuance of the 18 Eliz. c. 3. except in certain cases provided for by 49 Geo. III. c. 68. in which his appearance may be dispensed with. These are, 1. When one magistrate certifies under his hand, to such sessions, that it

(1) But per Lord Ellenborough, C. J. when the complaint is merely for non-payment of money, it is the general duty of magistrates to issue a summons in the first instance before they grant a warrant of apprehension, and it requires very strong words to take away the necessity of a summons." Rex *v.* Martyr & Fulham, 13 East, 31. But if this rule is to be considered as extending to cases of original complaint under 49 Geo. III. it will in many cases defeat the object of the statute, by operating in furtherance of the putative father's escape, instead of being a means to indemnify the parish by facilitating his apprehension. But query whether the justice should not summon the party in all cases unless he has reason to conclude that the person charged is likely to abscond. See post. 265.

(2) Dickson *v.* Brown, Peake's Ni. Pri. Cas. 234. and see Mayhew *v.* Parker, 8 Term Rep. 110.

was proved to him, on oath of a credible witness, either that the woman was not delivered, or was so, within the month previous to the day of holding the sessions. 2. When two justices certify to the next; or if the woman shall not be delivered at the next, then to the immediately subsequent sessions, that an order of filiation has been made, or that it is unnecessary on account of the child's death, or for other like sufficient reasons; and the sessions are required, in the first cases, to respite, and in the second, to discharge the recognizance, without requiring the personal attendance of the father, or his surety. (1)

Recognizance when discharged.

Under 6 Geo. II. if the woman is married (2), or dies before delivery, or miscarries, or appears not to have been with child, the recognizance shall be discharged by the sessions, or, if in custody, the man may be immediately released by one justice (3). He may likewise be discharged by a single magistrate after summoning the overseers, if no order of filiation is made within six weeks after the woman has been delivered (4). And these pro-

(1) As to the effect of this security or recognizance and remedy thereon see post. 159. sect. 10. and the party's appearance at sessions, under the commitment, post.

(2) The words of the act are general, "If she shall be married before she shall be delivered." This does not, at first view, appear to make the putative father's release depend exclusively upon an intermarriage between the woman and him, but rather imports, that he should be liberated if the woman marry at all. But as the statute has been held to extend to the bastards of married women, notwithstanding the use of the word "*single*," that interpretation seems to require, that the release of the person charged should be confined to the single case of his marrying the woman. In that event, the operation of the statute ceases, because the reason for it is done away. For if "the issue be born within a month or a day after marriage, between parties of full lawful age, the child is legitimate." Co. Lit. 244. a. See ante, Vol. i. 294.

(3) 6 Geo. II. c. 31. s. 2.

(4) The recognizance taken under 49 Geo. III. is likewise confined to cases when the complaint is made before the child is born.

visions

visions do not seem altered by 49 Geo. III., except that possibly they may be considered as constituting those "other like sufficient reasons," referred to in the statute, which being certified by two justices to the sessions, shall enable the latter to dispense with the personal appearance of the father and his sureties.

SECT. IV.

Of the Order of Filiation out of Session.

Order of filiation, two modes of making.

THE first step to be taken after the child is born, is to obtain an adjudication as to the reputed father, and an order requiring him and the mother to maintain it. This can be effected in all cases where the child is likely to become chargeable, whether the mother be married or single (1), and the order may be made in either of the following ways: 1st, By two justices, under 18 Eliz. c. 3. 2d, By the justices at sessions, under 3 Car. I. c. 4. s. 15.

But no order can be made unless the child was born alive. (2)

1. By two justices.

The 18 Eliz. c. 3. s. 2. impowers two justices out of sessions to take order, as well for the punishment of the mother and reputed father, as for the relief of the parish. For the latter purpose they may charge the mother, or reputed father, with payment of money weekly, or other sustentation for the child's relief. (3)

(1) See Rex *v.* Luffe, 8 East, 193. as to when an illegitimate child is to be considered as likely to become chargeable. See Rex *v.* Alveley, 3 East, 563. ante, 178. Rex *v.* Nelson, and the cases cited, post. 272. (1).

(2) Rex *v.* De Brouquens, 14 East, 277.

(3) Ante, (1).

An

An order of filiation may be made by two justices, under 18 Eliz. c. 3. although the putative father has been bound over to appear at the quarter sessions, under 49 Geo. III. c. 68. s. 2. For that statute not only supposes that such an order may be made, but requires that the recognizance shall be discharged, upon its being certified to the sessions in writing under the hand of two justices. (1)

Though party bound in recognizance under 49 Geo. III. c. 68.

But they have no authority to make an order, where the child is born in an extra-parochial place (2), unless it be an hamlet [township] which maintains its own poor. (3)

No jurisdiction over extra-parochial place.

And where an order is founded on the 18 Eliz. c. 3. it is not required that the parish officers should be the complainants, for the act gives the justices power to make such order on the complaint of any other. (4)

An order must in general be made upon the *vivâ voce* examination of witnesses, and cannot be founded upon affidavit without such evidence. (5)

Order made upon vivâ voce testimony.

(1) Yet the condition of the recognizance is to appear at the next sessions, and abide and perform such order or orders "as shall *then* be made," in pursuance of the 18 Eliz.

(2) Rex *v.* Baker, 1 Bott, 471. Pl. 588. Rex *v.* Mitford, Cases, Sett. 150. 1 Bott, 489. Pl. 627. The 6 Geo. II. c. 3. gives the justices jurisdiction upon application "by the overseers of such parish, or by any substantial householder of such extra-parochial place," i. e. to which the bastard shall be chargeable, or likely to become so.

(3) Rex *v.* Mitford, ante, (2).

(4) Rex *v.* Bucknall, 1 Barnard. K. B. 261. and see post, 269. But in Rex *v.* St. Mary's Nottingham, it was thought by Page, Probyn, and Lee, justices, *absen.* C. J. a fatal exception to an order that the complaint did not appear to have been made by the parish when the child was born, but the contrary rather appeared, for it was stated that she was a casual poor; and by 18 Eliz. c. 3. no parish but that where the child is born has a power given of complaining, and she might have been born in a parish that lies in another county, and then these justices could not have any power to make their order. East, 10 Geo. II. Ford's MSS. 13 East, 57. (a). 1 Const. Tit. Bastard, sect. 5.

(5) Rex *v.* Colbert, Comb. 103.

Where

Of the mother.

Where made upon the reputed father, the mother's testimony, if living, is generally if not always resorted to; and if she be single, it is usually the sole evidence.

4. If the mother is dead, her examination under 6 Geo II. sufficient.

But where the woman had been examined under 6 Geo. II. c. 31. and deposed upon oath to the reputed father, before a justice, and afterwards dies, her examination thus taken before a magistrate, being in the course of a judicial proceeding, is admissible evidence, like the deposition taken under the statute of Philip and Mary (1); and being admissible, and uncontradicted by other evidence, it seems conclusive, so as to enable the justices to make an order of filiation. (2)

Her death when sufficiently averred by reference to make it evidence.

An order purported by the title to be made, "concerning a female bastard child, born in the township of B. of the body of M. C. single woman, since deceased," and recited that, "whereas it had appeared to them, the said justices, as well upon the complaint of the churchwardens, &c. of the township of B. &c. as upon the oath of R. T. of B. &c. that the *said M. C.* about six weeks ago then last past, was delivered of a female bastard child, in the said township of B. and that the said bastard child was then chargeable to the said township, and likely so to continue; and further, that, upon the examination of the said M. C. upon oath, before A. B. (another justice of peace) dated 11th of May last past, in the presence of the said R. T. the said M. C. upon her oath, charged G. C. of, &c. with having begotten her with the child of which she was then pregnant; they, therefore, upon the examination of the cause and circumstances of the premises, as well upon the oath of the

(1) 1 & 2 Ph. & M. c. 13.

(2) Rex *v.* Ravenstone, 5 Term Rep. 373. where the order was made at the quarter sessions, but the principle applies equally to one before two justices. See Rex *v.* Clayton, 3 East, 58. and ante, 182.

said

said M. C. before birth so taken, as aforesaid, and also upon the oath of the said R. T. did adjudge the said defendant to be the reputed father of the said bastard child," &c.

It was objected to the order, that the material fact of filiation could only appear by the woman's testimony, if living; and, according to Rex *v.* Ravenstone, by her examination in writing, taken under the statute, if dead. But it does not appear that she was dead at the time of the examination; nor, if dead, that her examination had been taken in writing, unless by inference from its being stated to be dated; and if written, it does not appear that it was proved, or read over to the magistrates, when the order was made. It rather seems, if any evidence at all were given, it was by the parol testimony of R. T.

But by Lord Ellenborough, C. J.—The law has been long settled, that every intendment shall be made in favour of an order of justices. Now it is not a very forced intendment, that the examination of M. C. which is described *as bearing date the* 11th of May, &c. was in writing; for it must be something on which a date could be impressed. Then it must also be produced to those who so describe it. Nor does it necessarily appear, that only the fact of the examination of M. C. was testified by R. T. the witness examined; for the order goes on: " And further," &c. by which it must be understood, that it *further appeared* to the justices, that upon the examination of the said M. C. taken on oath, &c. in the presence of R. T. she charged the defendant with being the father, &c. Then it is not a strained inference to make, that the original examination, from whence this appeared to the justices, was produced and verified upon the oath of R. T. Besides, this is a case after

appeal to the sessions, where it must be taken that these objections if founded in fact, would have been proved and admitted; and that if either not made, or made and over-ruled, they were without foundation in fact. Then if the woman was dead, the proceeding upon her examination afterwards is fully warranted by Rex *v.* Ravenstone. (1)

As to the objection, that it did not appear that the woman was dead, the contrary must be intended, for the title of the order described M. C. as being deceased, and she was mentioned in the body of it as the *said* M. C. which refers to the woman, said in the title of it to be dead. (2)

Testimony of married woman, how far competent to bastardize her child.

It is now settled, that where an illegitimate child is charged to have been begotten upon a married woman, the justices need only inquire whether the husband's non-access is distinctly proved (3). The wife may in such case give evidence of the criminal conversation; but she shall not be permitted to prove the absence and want of access of her husband, since there is no necessity that can justify her being a witness to these circumstances. (4)

When

(1) Ante, 262. (2).

(2) Rex *v.* Clayton, 3 East, 58.

(3) Rex *v.* Bedall, 2 Stra. 1076. Cas. Temp. Hard. 379. S. C. ante, Vol. i. 294. et seq.

(4) Rex *v.* Reading, Cas. Temp. Hard. 79. ante, Vol. i. 298. n. (3). Andr. 10. Ford's MSS. states the facts of this case thus: "John Alman was husband of Mary Alman, and leaving her upon the 25th May 1731, had no access to her from that time till the 25th May 1733, upon which day she was delivered of a bastard child, begotten by the defendant Reading: all which was proved by the evidence of Mary Alman. There were *other witnesses* who proved that the husband was within seven miles of his wife within that time." See Rex *v.* Luffe, 8 East, 196. n. (2). Lord Ellenborough agrees to the doctrine in the text, but adds, "by a parity of reasoning it should seem, that if she

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When an order, therefore, was made upon the oath of a married woman alone, who swore that her husband was in gaol long before her bastard child was begotten, and ever since, and that she had no access to him, and that R. got the bastard, it was quashed. *Per Curiam.* It was said by Lord Hardwicke, in Rex *v.* Reading (1), that although a wife may be admitted to prove the fact of adultery, she shall not be admitted to prove that her husband had no access, because that can be proved by other persons, *and an order of bastardy therefore could not be made on her testimony alone.* The case of Rex *v.* Bedall (2) differs from this, for there were witnesses to prove the husband had no access; and as the justices have determined solely on the evidence of a wife, the order must be quashed (3). But if other witnesses are examined to prove the husband's non-access, it does not vitiate the order that the wife is likewise examined to that fact. (4)

Order upon her single testimony bad.

The putative father's presence during the woman's examination, is unnecessary to the validity of the order (5). But he must be summoned to appear previous to an order being made (6): and a summons by another justice who does not join in the order is sufficient. (7)

Father's presence during woman's examination unnecessary.

Must be summoned previous to making order.

be admitted of necessity to speak to the fact of the adulterous intercourse, it might be also perhaps competent to her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which nature allows for parturition." Rex *v.* Luffe, ib. 203.

(1) Ante, 264. (4).

(2) Ante, 264. (3).

(3) Rex *v.* Rook, 1 Wils. 340.

(4) Rex *v.* Bedall, ante, 264. n. (3). Rex *v.* Luffe, 8 East, 193.

(5) Rex *v.* Upton Gray, Cald. 308. 2 Bott, 479. Pl. 599.; and see Rex *v.* Martyr and Fulham, 13 East, 55. ante, 258. (1).

(6) Rex *v.* Cotton, 1 Sess. Cas. 179.

(7) Rex *v.* Neale, 1 Bott, 482. Pl. 605.

Woman's examination, taken before two justices.

May commit if she refuses to answer.

As the examination of the woman is a judicial act, both justices must be present when it is taken (1), although it is sufficient if one examine her (2). If she refuse to be examined, the justices may commit her to prison (3); but they must not only be together at the examination, but when they make and sign the commitment. (4)

Adjudication without examining the mother.

Father's confession.

If the mother die previous to an order of filiation being made, and without having been examined under 6 Geo. II. c. 31. one may be afterwards made upon the reputed father, by means of other evidence. Cases will rarely occur in which justices can extract sufficient proof from other sources to warrant them in making it; but when such testimony does exist, as supposing the man to have acknowledged the child to be his, and to have maintained it as such, it seems enough to warrant an adjudication that he is the putative father. For though the justice cannot compel him to give testimony in this case, yet there is no fault in admitting him to do it. (5)

The bastard likewise may, if competent in other respects, be examined upon oath; for though it would be

(1) Rex *v.* Beard, 2 Salk. 478. 1 Bott, 477. Pl. 394. Rex *v.* West, 6 Mod. 180. 1 Bott, 478. Pl. 595. Billings *v.* Prinn, 2 Black. Rep. 1017. 1 Bott, 478. Pl. 598.

(2) Rex *v.* West, ante, (1).

(3) This appears to be taken for granted in Billings *v.* Prinn, ante (1). As to the form, see ante. Their right to commit seems undeniable, where there is a refusal to answer on inquiry respecting the putative father, under 49 Geo. III.; for such questions do not tend to criminate the woman. But it does not seem decided, whether magistrates, when proceeding under 18 Eliz. c. 3. can compel a woman to answer questions which go to prove her to be the mother of an illegitimate child, as her answers may subject her to both civil and ecclesiastical punishment. A distinction however, may arise where the woman resides with the child, and both are chargeable, for, in that case, the right to examine seems incident to the right to inquire into their settlement as paupers. See ante, and also the Vagrant Act; and, indeed, possession of the child seems to amount to presumptive evidence, that the woman who has it, is the mother.

(4) Billings *v.* Prinn, ante, (1). But see ante, Vol. i. 50.

(5) Rex *v.* St. Mary's Nottingham, 13 East, 57.

be ridiculous to examine her as to the certainty of her father, yet she may properly enough be examined as to some circumstances relating to it; as, whether the man when accused with it, had acknowledged the child to be his; or whether it was constantly reputed to be so, and such like. (1)

If the party obeys the summons and appears, he may make his defence against the charge. But if he will not attend himself, there is no reason that the justices should hear any witnesses, or defence made for him; for if that were allowed, no offender of this sort would appear. It is but as this court (2) does, when orders of bastardy are removed hither by *certiorari*, which never allows any exceptions to be taken to the order, unless the party attend in person. (3)

Defendant's appearance to the summons.

If he do not appear can make no defence.

If the justices, upon hearing the evidence on both sides, are satisfied that the person, charged in the woman's examination, is father of the child, they should proceed to fix him with it, by an order of filiation. It may be made at any distance of time, as fourteen years after the child is born (4), and notwithstanding the mother's death. (5)

Order of bastardy when made.

SECT. V.

Form of an Order of Filiation. (6)

1. An order may include more bastard children than one, if begotten by the same father upon the same mother.

1. Order may be on both parents

(1) Rex *v.* St. Mary's Nottingham, 13 East, 57.

(2) The King's Bench.

(3) Rex *v.* Neal, 1 Bott, 482. Pl. 605.

(4) Rex *v.* Miles, 1 Sess. Cas. 77.

(5) Rex *v.* Ravenstone, Term Rep. 373. ante, 262. (2). also Rex *v.* St. Mary's Nottingham, ante, (1). where the daughter when affiliated was 35 years old.

(6) See ante, Title Order of Removal, 188. et seq., and of Maintenance, 232. &c.

and include several of their children.

ther (1). So likewise it may be made upon the mother (2); and it may be a joint order upon the mother and reputed father, requiring each of them to pay a certain proportion of the child's maintenance (3). And in one case, an order that the mother should maintain her child till seven years old, and the father should allow 1s. per week during that time, was quashed for another defect, but no objection was taken on this account. (4)

2. State the justices jurisdiction. The county. Sufficient in the margin. By justices of a liberty.

2d, An order must state the authority of the justices. The county therefore should be set forth, to shew that the fact arose where they have jurisdiction. But if it appear in the margin, that is sufficient; for the reason why the county should be in the margin, is to shew that the fact arose within the justices' jurisdiction (5). And where an order appeared to be made by two justices of the liberty of the tower of London, which has a separate commission of the peace, with officers, and quarter sessions of its own, Lord Hardwicke observed, I do not know whether the want of an averment in what county the liberty is, be an exception on 18 Eliz. c. 3.; however, that is fully cleared up by 3 Car. I. c. 6. (6); and the court held the original order good as to this exception. (7)

Must be two or more justices.

An order must be made by two justices, but is good if made by more. (8)

(1) Rex *v.* Skinn, 1 Bott, 470. Pl. 587.

(2) Rex *v.* Ellen Taylor, 3 Burr. 1679.

(3) Comb. 232.

(4) Rex *v.* Willey, 1 Bott, 490. Pl. 682. See also Reg. *v.* Collins, 11 Mod. 178. But in Burnell's case, 1 Vent. 48. and in Sherman's case, Ib. 211. such orders were held bad.

(5) Rex *v.* Messenger, 1 Bott, 491. Pl. 633.

(6) Which gives justices of a liberty the same jurisdiction as justices of a county.

(7) Rex *v.* Messenger, ante, (5).

(8) An order made by five justices. Hatton's case, 2 Salk. 477.

And it need not appear that they were justices in or next the limits where the parish church is; for the words of the statute are only directory, and were so held in Rex *v.* Rooke. (1) Need not be of the limits, &c.

3d, It is generally expressed to be made upon the complaint of the churchwardens and overseers, but this is not necessary. (2) 3. Need not be on complaint of churchwardens, &c.

4th, It is usual and proper to state that the defendant was summoned, and that he either appeared in consequence thereof, or neglected to do so. But it is not in strictness necessary that this should be averred on the face of the proceeding, as the court will intend that he was, unless the contrary appear. (3) 4. Proper t not ssential, o state the efendant's ummons.

5th, The examination of the woman on oath, as to her delivery of a child, and by whom it was begotten. (4) 5. Woman's examination.

6th, It must state the sex, or else the name of the child. (5) 6. Child's sex.

7th, It must appear from the words used by the justices that the child was born in that parish for whose relief the order is made; for the birth is the foundation of the jurisdiction, it being to that parish only the child can 7. And adjudge it born in parish.

(1) Rex *v.* Skinn, 1 Bott, 470. Pl. 587. Rex *v.* Baker, S. P. ib. 471. Pl. 588. And see Rex *v.* Crosse, Comb. 289. where this exception was taken to an indictment, for refusing an apprentice, and over-ruled.

(2) Rex *v.* Fox, 6 Term Rep. 148. Rex *v.* Buckall, 1 Barnard, K. B. 261. Rex *v.* Baker, 1 Bott, 471. Pl. 588. But Rex *v.* Nottingham, 2 Bott, 478. Pl. 597. is contra, ante, 261. (4).

(3) Rex *v.* Clegg, 1 Str. 475. Rex *v.* Clayton, 3 East, 58., and the cases then cited, respecting similar orders made by justices of the peace, upon other subjects. See also Rex *v.* Hawkins, Poor Set. 127.

(4) But see how far this applies where the mother is married, ante, 264, &c.

(5) Rex *v.* England, 1 Str. 503. It is most usual to state the sex, but I have quoted the case as reported.

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Allegation thereof insufficient.

be ultimately chargeable (1). An allegation in the complaint, without adjudication or words of the justices, from whence the place of its birth can be collected, is insufficient, for the complaint may be untrue (2). An order ran in this form: "We A. and B. two justices of the borough of L. residing within the limits where the parish church is, within which parish the child was born, do," &c. and quashed; for it only avers that the justices dwelt in the parish in which the child was born, which might not be that to which the relief was ordered. (3)

But formal adjudication unnecessary if in justices' words.

But a formal adjudication is unnecessary. It is sufficient if it appear any where upon the order in the words of the justices (4). An order in the following form was held good: "The order of us, L. and D. two justices, &c. residing near the parish of H. concerning a bastard child of E. G. born in the said parish of H." and adjudging J. T. "to be the father of the *said* child. (5)

And

(1) Rex *v.* Cuddington, 1 Bott, 488. Pl. 621. Rex *v.* Willey, 2 Bott, 490. Pl. 632. Anon. Styles, 368. Rex *v.* Childers, 1 Barnard, K. B. 326. Rex *v.* Baker, ib. 471. Pl. 588. Where an order was intitled thus: "The order of us, A. B. and C. D. justices, &c. concerning a bastard child born in the foreign of R. in the parish of R. and chargeable thereto, *of which* the churchwardens and overseers of the foreign of R. *have made complaint*; it was quashed, because the birth is only in the title of the order and complaint of the officers. In that case, the chief justice is made to say, "that if there be no adjudication that the child is born in the parish, the order is bad," post, 272. (4). See also Rex *v.* St. Mary's Nottingham, 13 East, 57. ante, 267. (1).

(2) Rex *v.* Godfrey, 2 Ld. Raym 1362. Rex *v.* Stanley, Cald. 172. 1 Bott, 495. Pl. 641. Rex *v.* Churchwardens of Hexham, 1 Bott, 489. Pl. 630. where the order was made upon the parish officers to maintain it until the mother should be able to provide for it, the mother not being able to keep it, the father unknown, and the child likely to perish; and quashed, it not appearing that the child was born there.

(3) Rex *v.* Butcher, 1 Str. 437. 1 Bott, 491. Pl. 631.

(4) Per Denison, Just. in Rex *v.* Fox, 6 Term Rep. 150.

(5) Rex *v.* Fox, 1 Bott, 492. Pl. 637. In the report of this case, from Lord Kenyon's MS. the order was to the following effect: "The order of

And an order which recited that the child was baptized in the parish, and did not adjudge that it was born there, was confirmed. For, as the order says, "she was delivered of a child baptized in the parish," that by a reasonable construction may be taken to be the place of the birth of the child: and as to its being recited, that is sufficient; for, in orders of removal, it is, "*whereas upon complaint*," and that is looked upon as affirming a fact done; so, "whereas such a child was baptized in such a parish," is a sufficient affirmation of the fact (1). Likewise where it was excepted to an order that it is no otherwise affirmed, that the child was born in G. than by a "whereas," which is a recital only. *Per Curiam.* The whole order is the words of the justices, and in this case a sufficient adjudication of the fact. (2)

Order reciting child baptized in the parish held good.

8. Also it has been held that if it appear by the order, that the bastard was examined upon oath, and consequently that being old enough to be sworn, she might have gained a settlement for herself, the justices should adjudge the parish to be the place of her last legal settlement. (3)

Adjudge the bastard's settlement, when.

us L. and D. two justices, &c. residing near to the parish of H. concerning a male bastard child of E. G. *born* in the said parish of H." The objection taken to this part of the order was, that it is not adjudged that this child was born in the parish of H. but only so said in the title of the order. But over-ruled, for it need not be in the adjudication, Rex *v.* Redshaw, 22 G. II. Rex *v.* Rooper, 26 G. II. and it is clearly settled, that if it appear in any part of the order *and in the words of the justices*, (which is the case here,) it is sufficient.

(1) Rex *v.* Moravia, 1 Bott, 492. Pl. 636.

(2) Rex *v.* Gravesend, 1 Bott, 491. Pl. 635. and that an express adjudication appeared on the proceedings in this case, see Rex *v.* Pitts, post. ( ).

(3) Rex *v.* St. Mary's Nottingham, Ford's MSS. 13 East, 57. (*a*) ante, 267. (5).

9. Must aver it chargeable.

9. It should state the child to be chargeable, or likely to become so, to the parish (1), and the order made for its relief.

An order was quashed because it was not said that the child was chargeable to the parish, but to the hamlet. But if it was an hamlet that maintained its own poor, it had been good (2). So one ordering the father to maintain the child, "for the relief of the governor and guardian for the poor of Colchester," and not saying "for the relief of the poor," was quashed. (3)

An order was entitled thus: "The order of us A. B. and C. D. justices, &c. concerning a bastard child born in the Foreign of Ryegate, in the parish of Ryegate, and chargeable thereto, of which the churchwardens and overseers of the Foreign of Ryegate have made complaint. It was objected, that it is an *extra-parochial place;* for it appears that the child was born in the Foreign of Ryegate. *Answer,* It is alleged to be within the parish. The Foreign of Ryegate is the parish of Ryegate." But the order was quashed, upon this and another exception. (4)

9. Adjudge defendant to be the reputed father.

It must adjudge the party to be the reputed father of the said bastard child. An order which pursued the form in Burn (5), with the omission of the clause following, "We, therefore, upon examination of the cause and circumstances of the premises, as well upon the oath of

(1) Comb. 39. Rex *v.* Nelson, 1 Vent. 37. But Rex *v.* Matthews, Salk. 475. Anon. 10. Mod. 84. contra. For it is self-evident, that every bastard child is become chargeable.

(2) Rex *v.* Mitford, Cas. Sett. 150. 1 Bott, 489. Pl. 627.

(3) Rex *v.* Howlett, 1 Bott, 491. Pl. 634. 1 Wils. 35. S. C.

(4) Rex *v.* Baker, 1 Const. 476. Pl. 626. ante 271. (1).

(5) 1 Burn's Justice, tit. Bastard.

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the said A. B. as otherwise, *do hereby* adjudge him the said C. D. to be the reputed father of the said bastard child," was quashed, as not adjudging C. D. to be the reputed father, notwithstanding the recital in the preceding part, " Whereas it appears to us," *the said justices*, &c. (1)

10. The adjudication must appear to be made by both justices. Two magistrates made an order, and when it came to the adjudication, it was, " we the said justices doth adjudge," instead of " do adjudge." After the case had depended two terms on this objection, and been several times stated, and the record in Rex v. Talwood examined, the Court on the objection quashed the order. (2) 10. A[illegible]

11. If the reason assigned for the adjudication be insufficient, the order is bad. 11. [illegible]

Upon an order of bastardy, it was stated, that the husband had been absent six years, and that during his absence, the defendant had carnal knowledge of the wife, and *therefore*, we adjudge him to be the putative father. But by the Court, this order must be quashed; for his lying with her is not a sufficient reason to infer him the father of this child; *and though the justices need not shew the ground they go upon, yet if they do, and it appears no sufficient ground, their order will be bad.* (3)

12. It must specify the sum which it requires the party to pay in relief of the parish. It may direct a weekly payment to be made on a particular day in the week, al- 12. [illegible]

(1) Rex v. Pitts, Doug. 662.

(2) Rex v. Weston, 2 Ld Raym. 1198.

(3) Rex v. Brown, 2 Str. 81[illegible] post. 2[illegible]3. (4)

though the first week from making the order is not complete on that particular day (1); and if no day be mentioned, it is payable at the commencement of the week (2). And if it directs that a certain sum be paid towards the expences of the parish on account of the child, it will be good, although it do not particularize what the expences were (3). An order requiring the defendant "to pay nine pounds in gross immediately upon sight of the order, and after that, so much weekly," is good; for the gross might be only for indemnifying the parish for money previously expended (4). So likewise one for a sum in gross, "for maintenance and other incident charges (5)." But if it had only stated it to be "for maintenance," it had been too general (6). So an order adjudging 36l. to be paid, part whereof had already been paid, for the maintenance of the child, and other incident charges and expences, held good. For the words, "other incident charges," must be incident to the maintenance; and the rather, as a part thereof is already paid. Wright J. said, that at first he was of a different opinion, and thought the words, "*incident charges*," extremely general: but on looking into it, he found there were orders as general as this is. (7)

Order of paying in gross the expences.

Instances of such orders sustained

An order to the putative father "to pay the churchwardens and overseers of the parish 50s. for the midwife, and other charges, and for the maintenance of the child

(1) Rex v. Weston, 1 Bott, 487. Pl. 619. and quære if the payment should not be weekly as the statute directs. For Semb. an order to pay monthly is bad. Rex v. Sharpe, 1 Sid. 222. but adjourned.

(2) Rex v. Fearnley, 1 Term Rep. 316. ante, 234.

(3) Rex v. Skinn, 1 Bott, 470. Pl. 587.

(4) Rex v. Odam, 1 Salk. 124.

(5) Rex v. Gravesend, 1 Bott, 491. Pl. 635. upon the authority of Reg. v. Odham, and see Rex v. Eve, 2 Show. 256. But Rex v. Colbert, 1 Bott, 486. Pl. 615. is contra.

(6) Rex v. Gravesend, ante, (5).

(7) Rex v. Moravia, 1 Bott, 492. Pl. 636.

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from its birth, till the day of making the order, and from that day so much a-week, so long as the child shall continue chargeable," is good; although it is not adjudged that so much as 50s. had actually been expended by the parish. For the justices may indemnify the parish in gross, for the charges of lying-in, and other incidental charges, and the charges of the midwife, &c. fall upon the parish (1). And it need not state by whom the money is disbursed (2). It is likewise no objection that it orders the money to be paid to the overseers. (3)

May order the money to be paid to the overseers.

13. In some cases, the court of king's bench seem to have quashed an order, where the sum thereby required to be paid was either unreasonably small, or excessively large. (4)

13. Should order reasonable maintenance.

14. The justices have power to order the parent to pay so far as is necessary to indemnify the parish for the expence of maintaining the bastard, but no further. The payment, therefore, should be limited in the order to such time as the child shall be a burthen upon the parish. An order to pay so much a-week indefinitely, is bad (5). The usual form is, "during so long a time as the said bastard child shall be chargeable (6);" or *if it* be "till it shall be no longer chargeable," it is good (7).

14. Should restrict maintenance to time, child is chargeable.

(1) Rex *v.* Fox, 1 Bott, 493. Pl. 638. But see Rex *v.* Sherman, 1 Vent 210.

(2) Rex *v* Smith, 1 Bott, 487. Pl 618.

(3) Rex *v.* Weston, Salk. 122. The objection was, that by the order the father was directed to pay to *the overseers of the poor*, and that it ought to have been to the inhabitants of the parish generally, but the Court were of opinion, that, as before the institution of overseers, the justices might order the money to be paid to two or three of the inhabitants, so now they may to the overseers.

(4) An order to pay 2d. a-week, quashed, as too small. Rex *v.* Perkasse, 1 Ibid 363. Also, an order to pay 7s. a-week, 24 Car. II. quashed, as excessive, Rex *v.* Sherman, 1 Vent 210.

(5) Rex *v.* Matthews, 2 Salk 475.

(6) It is the right way. Per Lee, C. J. Newland *v.* Osman, 1 Bott, 466. Pl 574.

(7) Rex *v.* Johnson, Comb 69.

If while two bastards chargeable, good

So it is well enough, if it directs 4s. a-week to be paid, during so long as the two female bastard children shall be chargeable, without specifying how much for each; for if either die, the party is discharged (1). But orders requiring the payment "till the child was eight years old (2)," or "nine, if it should so long live (3)," or till twelve years old (4), have been held good, because it cannot be intended to be able to provide for itself sooner.

Orders till child arrive at a certain age held good.

Yet it seems to have been plausibly objected in the first of these cases, that possibly the child might gain a settlement, or a person might give him an estate, or his father might take him. But the Court thought these possibilities too remote. (5)

Such orders, when bad.

But an order to pay 3s. weekly, "till the child attains the age of fourteen years, was held bad (6)." And in one case, an order adjudging the reputed father to pay so much, till the child be of seven years of age, was quashed; for they cannot charge the father for any certain determinate time, but as long as the child shall be chargeable to the parish. (7)

15 Cannot order a sum in gross to be paid at future day.

15. Further, the justices cannot order a sum to be paid at a future day for a particular purpose, as for binding the child apprentice, for perhaps it may never be necessary.

(1) Rex v. Skinn, 1 Bott, 470. Pl 587.

(2) Smith's case, Poor, Sett. 64. See also Comb. 282.

(3) Rex v. Street, 2 Str 788.

(4) Rex v. Buckall, 1 Barnard. K. B. 261. But Barwell's case, 1 Vent. 48. is contra, and in Reg. v. Collins, 11 Mod. 178. Reg. v. Atkins ib. 172 orders to pay till child be ten years old, quashed for this defect.

(5) Smith's case, ante, (2). But see the reasoning of Twisden, J. Rex v. Sherman, 1 Vent. 210.

(6) Rex v. Bakebaker, 2 Salk. 486. Semb. Rex v. Sharpe, 1 Sid. 222.

(7) Rex v. Brown, 2 Salk. 480. and see the reasoning of Twisden J. ante, (5), and the cases cited, supra, n. (4).

cessary (1). And if the order direct that the putative father "shall give security to the parish to perform the order," it is bad as to that. (2)

16. By 49 Geo. III. c. 68. s. 1. 4. the putative father is made liable to pay all reasonable charges and expences incident to the birth of the child, and also the reasonable costs of apprehending and securing him, and likewise those of the order of filiation, all which are to be at the discretion of the justices or court making the order of filiation, who are authorized to order payment of the whole or part thereof, provided that the costs of apprehending and securing the father and of the order of filiation shall not in any case exceed 10l. But to render him thus liable the child must be born alive; for all the provisions in the several statutes respecting bastardy assume that the child is born alive; and many provisions in this as well as the former acts are inapplicable to a [illegible] child. (3) — 16 Nor father to give secur ity

SECT. VI.

Of Orders of Filiation by the Justices at their Quarter Sessions.

Before 3 Car. I. c. 4. the sessions had no authority to meddle in the case of bastardy, till the two next justices, according to the statute of 18 Eliz. c. 3. had made — 17 ... by 3 Car. I. c. 4

(1) Rex *v.* Willey, 1 Bott, 490. I1 632. Rex *v* Brown, Comberbach, 448. Rex *v* Atkins, 11 Mod. 1/2 S P.

(2) Rex *v* Fox, 1 Bott, 472. Pl 590 and the cases in the margin Rex *v.* Eve, 2 Show, 256 See Rex *v* Sharpe, 1 Sid 222. Smith's case, 2 Bulst 342. Also post 284 (1)

(3) Rex *v.* De Brouquens, 14 East, 277.

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an order therein; and then, and not before, the justices in sessions might make a new order, &c. otherwise not(1). But they have authority to make an original order in such cases, under the first-mentioned statute. (1)

Orders of bastardy by sessions rare.

Original orders of this sort are not commonly made at sessions; the usual way being to bring the matter before that court by way of appeal, from an order of two justices (2). The same formality and precision is required in orders of this kind when made there, as if they had been made by two magistrates out of session.

Must summon party.

Order need not set it forth.

It is essential to right and justice, that the party should be summoned previous to their making an order upon him; but that summons need not be set forth on the face of the proceeding, as the superior court will presume there was one, unless the contrary appear. (3)

Order on constable and the mother, quashed as to the constable.

Where the putative father was apprehended upon a warrant, and the constable let him escape, an order of sessions made upon the constable, to pay 3l. towards the expences the parish had been at, and 1s. a week towards the maintenance of the child, and the mother to pay 6d.

(1) Slater's case, Cro. Car. 471. 1 Bott, 498. Pl. 727. The authority of the sessions, where it is not expressly given by statute, is thus declared by Lord Hardwicke. "If authority be given to two justices of peace, to do an act, and no appeal is given them, it may commence at sessions; but if an appeal be given, then it cannot be begun at sessions." Rex v. Bathurst, 1 Burr. 306. [illegible]

(2) Slater's case, supra, (1). Wood's case, 2 Bulst. 355. Rex v. Messenger, 1 Bott, 491. Pl. 633. Rex v. Clegg, 1 Str. 475. Rex v. Greaves, Dougl. 632. Rex v. Price, 6 Term Rep. 147.

(3) They are said to be very rare. Per Pratt, C. J. Rex v. Clegg, ante, (2). But the practice seems to have altered in this respect, in some counties, since 6 Geo. II. c. 31. was passed.

(4) Rex v. Clegg, ante, (2). Pratt, C. J. at first contra. Rex v. Clayton, 3 East, 58. and see ante, 269.

(5) Rex v. Hawkins, Poor Sett. 127, contra.

a-week,

a-week, was quashed, as to the constable, the justices not having authority to make it, but confirmed as to the mother. (1)

It seems as if the justices may at the same sessions quash, upon appeal, an order of bastardy made by two justices, and also make an original one upon another person, for the same child. (2) May quash order on appeal, and make another.

SECT. VII.

Of appealing against Orders of Filiation and Maintenance.

THE appeal given by the 18 Eliz. c. 3. to the party accused, arose only from his being bound over to the sessions, and the parish enjoyed no such power. (3) Appeal to what sessions.

49 Geo. III. c. 68. s. 5. gives an appeal to any person or persons aggrieved by an order made by justices under the provisions of the act not originating in sessions, to the next sessions for the county where the order is made, on giving notice to such justices or one of them, and to the overseers of the parish on whose behalf the order is made, or one of them, ten clear days before the quarter sessions, of his, her, or their intention to appeal, and the cause and matter thereof, and entering into a recognizance within three days after such notice before some justice for the county, with sufficient surety conditioned

(1) Reg. v Ridge, 11 Ann. 1 Bott, 499. Pl 651.

(2) Burrell's case, 1 Mod. 20. Pridgeon's case, 1 Bulst 255. Pl. 648. Rex v. Smith, 2 Bulst. 342.

(3) Per Lord Hardwicke, R v. Jenkin, Cases Temp. Hardw. 301. post

to

to try such appeal, and abide the judgment and order of and pay such costs as shall be awarded by the sessions, who are empowered to hear and determine the appeal, and give relief and costs to either party in their discretion.

By sect. 7. No appeal in any case relating to bastardy shall be brought, received in, or heard at the said quarter sessions, unless such notice shall have been given and recognizance entered into in manner aforesaid.

The 18 Eliz. directs the appeal to be made to the next general sessions, after the party has notice of the order, and made default in not performing it (1). This meant at the next general sessions for that part of the county in which the order was made, and not the first sessions, which might happen in a distant part of it (2). If such an order was made by two justices, during sessions' time, the appeal ought not to be to such sessions, but to that next ensuing (3). An appeal to the next *quarter* sessions after notice, was once held to be bad, because under 2 Hen. V. c. 4. a general sessions, to which it is directed to be made by 18 Eliz. might have intervened, and in that case, the appeal would not have been to the next general sessions (4). But in a recent case, an order was made on the 27th March, and the reputed father appealed to the next general quarter sessions, held 22d April, when the original order was quashed. Both orders being returned by *certiorari*, it was moved, on the autho-

(1) It seems from the words of 18 Eliz. c. 3. that the justices' power to commit, or to take a recognizance, arises from the party's not observing or performing the order. The consequence of which seems to be, that the appeal lies not to the first general sessions after the order is made, but to the first general sessions after it is disobeyed. Dalt. 45.

(2) Rex v. Coyston, 1 Sid. 149. 1 Bott, 495. Pl. 642.

(3) Burrell's case, 1 Mod. 20.

(4) Rex v. Shaw, 2 Salk. 482. 1 Bott, 496. Pl. 644. Rex v. Brown, Ib. Pl. 643. 2 Salk. 480.

4 rify

rity of Rex *v.* Shaw (1), to quash the order of sessions, that court having no jurisdiction, because a general sessions might have intervened. But Lord Kenyon observed, that the case cited did not appear to be one of the most authentic in Salkeld's reports. It is a general rule, that every intendment shall be made to support an order of justices; and as it does not appear that the general quarter sesions held on the 23d April, were not the sessions next following the 22d of March, we will not presume it, for the purpose of quashing the order of sessions; it was therefore affirmed.

As an appeal brings the whole matter both of law and fact before the justices at the sessions, the parish officers must, unless the party waves it by the tenor of his notice, be prepared and able to sustain their order, by sufficient evidence (2); and it is equally competent to the party interested to resist the fact, as to take such objections as occur to himself or his counsel upon the law. But if the objections are formal only, the sessions have power to amend them, under 5 Geo. II. c. 19. (3) Sessions must hear all the circumstances on appeal.

The majority of the justices, upon hearing the case, will either confirm or quash the order, according to their judgment: and where an order is substantially good, but directs something additional, which is illegal, they may quash such defective part, and affirm the remainder (4). But their order must be final, and either affirm or disallow that which is appealed against (5); and they cannot award costs to be taxed by the clerk of the peace. (6) How far they may quash or affirm. Of Costs.

(1) Ante, 280. (4).

(2) And they must begin by supporting it. Rex *v.* Kidd, 12 East, 50.

(3) As to the power of amendments under that statute, see post, title, Appeal.

(4) See post, sect. 8. 282. the power of the king's bench to do this.

(5) Rex *v.* Smith, 2 Bulsr. 342.

(6) Rex *v.* Skinn, 1 Bott, 470. Pl. 487. And see Rex *v.* Sweet, 9 East [illegible]. Rex *v.* St. Mary's Nottingham, 13 East, 57.

SECT.

SECT. VIII.

Of removing Orders of Bastardy into the Court of King's Bench, for the Purpose of quashing them.

Of removing orders by certiorari, when defendant at large.

If the defendant is dissatisfied with any order made upon him, either by two justices, or by the sessions, he may remove it into the court of king's bench by writ of *certiorari*.

When he is not in custody for disobedience of the order, he may remove it, if made by two justices, although there has been no appeal (1) to the sessions.

If in custody, must sue habeas corpus.

But where a person was in custody for disobeying an order of bastardy made at the sessions, the court seemed strongly inclined to think that no *certiorari* ought to have been granted to remove the order; but, that the proper mode of obtaining relief, if the defendant was entitled to it, was by *habeas corpus*, on a return to which the causes of commitment would be specified, upon which the court would be enabled to form an opinion, whether or not those causes were sufficient to justify his detention. (2)

Defendant must be present in court, on argument.

The defendant must be present in court when the case comes on to be heard, that if the order is quashed, he

(1) Rex v. Stanley, Cald. 172. As to the form of removing orders by certiorari, see post.

(2) Rex v. Bowen, 5 Term Rep. 156. Rex v. Smith, 2 Bulst. 342.

may

may enter into a recognizance to abide such order as may be subsequently made by the sessions. (1)

When orders are thus removed, the court of king's bench generally decide upon what appears on the face of the proceedings. They will quash one therefore, 1st, If substantially defective, as for instance, if there be no adjudication that the defendant is the putative father (2), &c. 2d, If it appear that the persons making it had no jurisdiction, and they will collect this not merely from the order itself, but from a consideration of all those orders which have been made upon the subject, and brought before them by the writ of *certiorari*. Thus, if two justices make an order of filiation upon A. and it is quashed by the sessions upon appeal, and then, two justices make another order upon A. as the reputed father of the same child, the court will quash this last order, because they will take notice that the former was conclusive, and discharged the defendant (3). 3d, Although the magistrates need not set forth their reasons for the adjudication, yet if they do so, and they appear insufficient, the court will quash the order. (4)

When quash the entire order.

1st, For want of adjudication.

2d, Jurisdiction. They examine all the orders removed.

Instance.

3d, Where reason for adjudication insufficient.

But where an order is defective only in one point, so that the remainder may subsist as a good order by itself, they will quash it as to the defective part, and confirm

Where quash only part.

(1) This is assigned as the reason by the Court in Rex *v.* Gibson, 1 Black. Rep. 198. But quære, if that would have been necessary where the party had entered into a recognizance under 6 Geo. II. c. 31. The necessity of his being present, is however admitted as a general rule. See Rex *v.* Mathews, 2 Salk. 475. Rex *v.* Price, 6 Term Rep. 147. where it was dispensed with. Rex *v.* St. Mary's Nottingham, East. 10 Geo. II. 13 East, ...

(2) See Rex *v.* Pitts, Doug. 662. and the various cases upon the form of orders thus removed, ante, 269. et seq.

(3) Rex *v.* Tenant, 2 Str. 716. post. 28...

(4) Rex *v.* Browne, 2 Str. 811. ante, 273. (3).

it

it as to the rest. Thus, where one, in other respects good, directed the defendant "to give security to the parish to perform the order," it was confirmed as to every thing but the security, and quashed as to that (1). So, where an order of sessions awarded costs to be paid by the defendant, to be taxed by the clerk of the peace, the court confirmed the order, except as to the costs, and quashed so much of it. (2)

No costs.

SECT. IX.

Order of Filiation, &c. how far conclusive.

Order of sessions, how far conclusive.

If a person be adjudged the reputed father of an illegitimate child by the justices at sessions, it is a sentence by the authority of the law, which cannot be impeached in the spiritual court, or elsewhere; and all are concluded to say the contrary, until it is reversed. (3)

Upon appeal, the order of sessions quashing or affirming an original is final.

An order of sessions made upon appeal, is not only final where it affirms the original order (4), but also where it reverses it.

An order of filiation was made by two justices, and afterwards discharged by the sessions upon appeal, after

(1) Per Holt, C. J. Comb. 264. Rex v. Fox. Rex v. Messenger, 1 Bott, 468. Pl. 585. Rex v. Price, 6 Term Rep. 247. ante, 283. (1). post. (2).

(2) Rex v. Skinn, 1 Bott, 470. Pl. 587. ante, 281. (5). Rex v. Sweet, 9 East, 25.

(3) Webb v. Cooke, Cro. Jac. 535. and 626. Thornton v. Pickering, 1 Freem. 283. 3 Keb. 200. cited 1 Ld. Raym. 394. Yet see a dictum of Holt, C. J., that if a person be committed as the father of a bastard child, and the child is no bastard, an action will lie. Dr. Greenvell's case, Comb. 482. Neither can it conclude the infant.

(4) Rex v. Arundell, 1 Sett. Cas. 221.

the

the merits were fully heard; neither two justices (1), nor a subsequent sessions, can make a new order for this matter against the same person (2). For being legally acquitted, he cannot be drawn in question again for the same fault. And it would be absurd, that when two justices have power by law to make original orders, and when the sessions have power upon appeal from those orders, as well as by original application, that two justices should have a power to alter their orders, when those very orders of alteration might be reversed by the sessions. (3)

To be final, must be made on the merits.

But it must be made upon hearing the merits. If they discharge an order for form, a new one may be made (4). And where an order of sessions quashing one made by two justices, recited, that it "was made on full hearing, the court of king's bench held, that the merits must have come before the sessions, and that the discharge was conclusive. (5)

Orders of two justices, how far conclusive.

An order of filiation made by justices out of sessions, is conclusive when unappealed from; but they have no power to make one to discharge the person charged as the reputed father, and to adjudge him not to be so; for they have no jurisdiction to acquit or convict the parties, but *to take order* for the relief of the parish, or punishment of the party, these being the only two sorts of orders which the statute empowers them to make. It would be inconvenient also to hold, that two justices may make a final order; for the statute 18 Eliz. c. 3. gives the parish no appeal; and the appeal for the party accused arises

Cannot make an order to adjudge the defendant not to be the father.

Parish has no right to appeal.

(1) Rex v. Tenant, 2 Ld. Raym. 1423. Slater's case, Cro. Car. 471. ante, 278. (1). Anon. 1 Vent. 59.

(2) Pridgeon's case, 1 Bulst. 252.

(3) Per Lord Hardwicke, Rex v. Jenkin, Cas. Temp. Hard. 301.

(4) Semb. Rex v. Tarian, 1 Bott, 500. Pl. 645.

(5) Ib.

only

only from his being bound over to the sessions; but if the two justices might make a final order of discharge, there is no method for the parish to appeal, but they would be concluded for ever without relief. (1)

But the adjudication by the sessions on appeal is final only as it respects the party who was adjudged the putative father by the original order; for if that order be repealed, the matter is as *res integra* so far as it respects all other persons. (2)

SECT. X.

Of the Remedies to indemnify the Parish.

Methods of indemnifying the parish.

THE chief object of all the statutes passed on the subject of bastardy, from 18 Eliz. c. 3. down to 49 Geo. III. c. 68. is to secure an indemnity to the parish, in which the child is born, against immediate charges and future expence, until it becomes settled in some other place. (3)

The remedies by which the child's maintenance may be forced from its parents, in consequence of an order of filiation, are: 1st, Security to indemnify the place to

(1) See Rex *v.* Jenkin; Cases Temp. Hardw. 301, 2 Str. 1050. S. C. But it has been shewn that a general sessions does possess this power of discharging the party upon application to them for an original order. See Rex *v.* Jenkin, supra, and the cases cited ib. by Lord Hardwicke. In Slater's case, there was an original order of sessions discharging the person who was charged to be the putative father. Two justices afterwards made an order, affiliating the child upon him. This order was resolved to be void, and that originally made at sessions to be final. Cro. Car. 374. See ante, 285. (1), (2).

(2) See Rex *v.* Smith, 2 Bulst. 343.

(3) Rex *v.* St. Mary's Nottingham, 13 East, 57.

which

which the child is likely to become chargeable. 2d, A recognizance. 3d, Commitment. 4th, Proceedings in the court of quarter sessions. 5th, In the court of King's bench, when the order is removed thither by *certiorari.* 6th, By sale of part of the father or mother's property for the child's support. 7th, By indictment.

1. *Of Security to the Place to which the Child is chargeable.*

The 18 Eliz. c. 3. enables the putative father and the mother to put in surety to perform the order, or else personally to appear at the sessions, &c. The act appears to refer only to one mode of putting in surety: and as that must be taken before a magistrate, in his judicial capacity, where the party binds himself to appear at the sessions, it seems probable that the only security intended by this statute was a recognizance, that is, a record whereby the recognisor acknowledges a debt to the crown, and which should be returned to the sessions by the justice who takes it. The constant practice, however, is for the parish to take a bond of indemnity, where an order is made under 18 Eliz. and the father is willing to give one. (1) Form of security under 18 Eliz.

The 6 Geo. II. c. 31. and 49 Geo. III. c. 68. expressly allow the putative father either to give security to indemnify the parish, or else to enter into a recognizance; which, according to the last act, is to appear at the ensuing sessions to abide and perform such order as shall be then made in pursuance of 18 Eliz. c. 3. [illegible]

(1) It is laid down by Jones, J. that the justices may either take a bond or recognizance, Stanton's case, 2 Bulst. 112. 2 Cons[illegible] [illegible] also the words of Lord Har[illegible] C. J., Rex v. Me[illegible] P. C[illegible]

As-

Amount in officers' discretion.

As it is in the reputed father's option either to give the security, or enter into a recognizance such as is prescribed by the act, the parish officers have a right to fix the amount of the security to be given at any sum they may think proper. (1)

Bond or note.

This security is usually given by bond; but a promissory note to the parish officers is equally legal (2), or a sum of money may be deposited with the overseer by way of composition with the parish (3). When a bond is given, it is generally entered into by the reputed father and one surety, with the existing churchwardens and overseers in trust for the parish, conditioned to indemnify, and save them harmless, from all costs and charges whatsoever, for or by reason of the birth, education, or maintenance of the child; and all actions, suits, charges, troubles, and demands of and concerning the same (4). All the inhabitants of the parish are to be considered parties to this instrument, and the overseers are but trustees for them. (5)

Effect of this bond.

Such a bond operates as an indemnity to the parish so long as the obligors continue solvent. The party thereby admits his obligation to provide for the child; and the only question to arise is, whether the parish is legally dammified so as to entitle its officers to put the bond in suit? (6)

(1) Per Lord Kenyon, C. J. Dickenson *v.* Brown, Peake's Ni. Pri. Ca. 234.

(2) Per Grose, J. Cole *v.* Gower, 6 East, 110.

(3) And the overseer is liable to an indictment if he fraudulently omits to give credit to the parish in his accounts for the money so received. Rex *v.* Martin, 2 Campb. 268.

(4) See the form of the bond 1 Burn's Justice, title, Bastard.

(5) Per Lee, C. J. Newland *v.* Osman, 1 Bott, 460. Pl. 574.

(6) See post. part 7.

But

But it is to operate only as an indemnity; therefore, in an action upon the bond, the obligors cannot be held to bail beyond the amount of the damage actually sustained by the parish. (1)

Note for a sum certain.

Also where a promissory note, in the usual form, is given to the parish officers, payable for a sum certain, unconditionally, at a given time; still they can recover no more upon it than the actual costs, charges, and expences to which the parish has been put in respect of the child upon whose account it was given. Where an action therefore was brought upon such a note for the entire value, and the defendants pleaded a tender to the amount of a less sum being that to which the parish had been damnified, the defendants were held entitled to a verdict (2). For the statute expressly requires that the security shall be taken, in order to indemnify the parish, and has thereby excluded its being taken for any other consideration (3). Its object was merely to indemnify the parish, and not to create a speculation of loss or profit to them upon the life or death of the child, and the parish officers should have no temptation to be careless in the execution of their trust: But it must be admitted, that they will not have the same interest to take care of the child, for whose maintenance they have received security for a sum certain, as if it were taken only for their indemnity. Upon the whole, therefore, weighing the inconveniences on either side, it is better to abide by the strict letter of the statute. (4)

(1) Kirk *v.* Strickland, Doug. 449. See post. 176. Toutson *v.* Wilson, 1 Campb. 396. Stainforth *v.* Stagg, Ibid 398. n.

(2) Cole and others *v.* Gower and others, 6 East, 110. See also Wilde *v.* Griffin, 5 Espin. N. P. C. 141.

(3) Per Lord Ellenborough, C. J. Ib.

(4) Per Lawrence J. Ibid.

II. *Of*

II. *Of the Recognizance under* 49 Geo. III. c. 49. *and its Extent.*

Recognizance under 6 Geo. II. c. 31.

A recognizance is entered into either before a single magistrate, or before two. The first may be taken under 49 Geo. III. c. 18. the latter in pursuance of 18 Eliz. c. 3. The recognizance under 49 Geo. III. is substituted for that previously required by 6 Geo. II. c. 31. which is thereby taken away, and the justice or justices authorized and required to commit the person charged with being the father, unless he shall give security to indemnify the parish or place, or shall enter into a recognizance upon condition to appear at the next quarter sessions, to abide and perform such order or orders as shall then be made in pursuance of the 18 Eliz. unless certain matters set forth in the act are certified to the sessions, when in some cases they are empowered to respite, and in others to discharge the recognizance without requiring the personal attendance of the putative father or his sureties.

III. *Of the Recognizance under* 18 *Eliz. c.* 3. *and its Extent.*

By 18 Eliz. c. 3. no security till order disobeyed. 6 Geo. II. c. 31. does not extend to it.

Where the first proceeding is under this statute, no security can be required of the defendant until he disobeys an order of filiation made upon him. There was no power to require it in that case under "6 Geo. II. c. 31. which was passed quite for another purpose: and the Court were of opinion that though the law seemed defective in that point, and it had been as well if the 6 Geo. II. c. 31. had extended to it, yet they must determine, as the law stood on 18 Eliz. c. 31." which did not enable the justices to require, by their order,

order, security from the putative father for performing it. (1)

The 49 Geo. III. appears to have made no alteration of the law in this particular, but is confined to the appropriation of a different punishment, in the event of neglect or refusal to perform that part of the order which provides for the child's maintenance.

Where the party does not perform the order of filiation after notice, or give sufficient surety to indemnify the parish by bond, in the manner already mentioned (2), he may enter into a recognizance before two justices, to appear personally at sessions, and also to abide such order as shall be made there, or else to perform the original order, if the sessions make none (3). Previous to 49 Geo. III. c. 68. if the defendant could neither give security to satisfy the parish, nor enter into this recognizance, he must be committed, to the common gaol, under 18 Eliz. c. 3. (4), or to the house of correction, under 6 Geo. I. c. 19. s. 2. (5); and the commitment must run in the disjunctive, that is, except he shall put in sufficient surety to perform the said order, or to appear, &c. (6)

49 Geo. III. sect. 4. provides that the charges and expences incident to the birth of the child, together with

(1) Rex *v.* Smith, 2 Bulst. 343. Rex *v.* Fox, 1 Bott, 472. Pl. 59. 6 Term Rep. 150. and the cases there cited, Rex *v.* Price, ib. 117. Also post. 295.

(2) Ante, 288.

(3) This recognizance does not seem altered or affected by the provisions of 49 Geo. III.

(4) Reg. *v.* West, 2 Ld. Raym. 1157.

(5) Rex *v.* Ellen Taylor, 3 Burr. 1679. 1 Bott, 473. Pl. 591.

(6) Smith's case, 2 Bulst 342. 1 Bott, 465. Pl. 577. and see Rex *v.* Messenger, 1 Bott, 468. Pl 585. The form of the commitment was so in Rex *v.* Ellen Taylor, 3 Burr. 1679. 1 Bott. 473. Pl 591.

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the costs of apprehending and securing the father, and those of the order of filiation, which last two are not to exceed 10l., are to be in the discretion of the justices, or sessions making the order of filiation, who are authorised, if they shall see fit, to allow and order payment of the whole or any part thereof; and for securing the payment after such allowance and order, the powers and provisions of the 18 Eliz. may be observed and practised.

But payment of the sums directed to be paid for the child's maintenance, if the order was made at sessions, or confirmed there, or if no appeal has been made against it, is to be enforced by apprehending the parties (1) under the warrant of a justice; and if they do not pay such sum as shall appear to them to be due and unpaid, or shew some reasonable or sufficient cause for not doing so, they are to be committed to the house of correction or common gaol of the county, and kept to hard labour for three months, unless they shall pay the same before the time expires.

The act seems, with reason, to have exempted the father or mother from payment of any sum becoming due during the period of their imprisonment, as it only provides for their subsequent commitment from time to time, when they neglect to pay sums becoming due under the order, after the expiration or discharge from their former imprisonment. (2)

(1) Father or mother.

(2) See the section more particularly recited, ante 281., and at large in the Appendix. The order is to be made upon application of one of the overseers of the parish, township, or place, liable to maintain the child, or where such child shall then be, and the magistrate must have proof to enable him to issue his warrant. 1. Of the order for payment. 2. Of its being unpaid. 3. Of a demand or refusal to pay. Or, 4. That the party has left their usual place of abode, and avoided a demand being made by such overseer. One question which may arise upon this act is, how far this remedy is to be considered as cumulative against the parents, and whether the proceedings under the recognizance taken, either under 18 Eliz. c. 3. or 49 Geo. III. c. 68. either against the principal or surety are at all effected by this clause, and if they are, to what parties, and to what extent.

IV. Of

IV. *Of the Defendant's Appearance at Sessions.*

If the putative father enters into a recognizance under the statute of Eliz. he must appear at the next general quarter sessions, or general sessions of the peace; and where the sessions are continued by adjournment, he has, at least according to the practice of some sessions, until the last day to make his appearance. Of appearance in pursuance of recognizance.

When the party is committed to actual custody for disobedience of an order made under 18 Eliz. c. 3. the cause of commitment is of a criminal nature. For not only getting or bearing the child, but leaving it to be a burthen on the parish, is an offence (1). A woman, therefore, who is unmarried at the time her bastard is born, may have an order of filiation and maintenance made upon her, notwithstanding a subsequent marriage, and her husband need not be summoned to shew cause against the order; but if she disobey it, she may be sent either to the common gaol, under 18 Eliz. c. 3. or to the house of correction, under 6 Geo. I. c. 19. s. 2. for she is committed for an offence, and for want of sureties. (2) Cause of commitment of a criminal nature. Of married women, good.

So, likewise, upon the same principle, it has been held, that a soldier, in actual pay, may be committed for disobeying an order of bastardy, for he is not protected by the clause in the mutiny act exempting him from arrest, where his original debt is under 20l. in as much as it excepts criminal matters. (3) So of a soldier

(1) Per Wilmot, J. Rex *v.* Ellen Taylor, ante, 291. (6). But that this may depend upon the child being chargeable. See post.

(2) Rex *v.* Ellen Taylor, ante. (1).

(3) Rex *v.* Archer, 2 Term Rep. 270. See Rex *v.* Bowen, 5 Term. Rep. 156. ante, 282. (2).

49 Geo. III. c. 68.

The recognizance taken under 49 Geo. III. c. 68. s. 2. is for the parties' appearance at the next quarter sessions, "to abide and perform such order or orders as shall then be made, in pursuance of the act of the 18 Eliz." It seems, therefore, that if an order of filiation is made out of sessions, the terms of the recognizance do not extend to it. (1)

Recognizances, when respited, &c.

This act enables the sessions to respite or discharge the recognizance in certain events, without requiring the personal attendance of the father or his sureties, upon the production of a certificate in writing, of one magistrate, in some cases; and of two in others (2). But lest the party should appear in person at that sessions, in pursuance of his recognizance, it seems expedient for the parish officers to attend, and apply for an order, or else to move to have the recognizance respited, upon proof of sufficient grounds for doing so, as was the practice before the statute passed. At least this seems the safest course to adopt, for if the words of the act are to be literally construed, the recognizance is satisfied by the putative father's appearance, to abide and perform the order to be then made, and therefore it may be discharged, unless such an order is made, or it is respited on the application of the parish on whose behalf it was originally taken.

Sessions cannot commit for

Where there is an appeal against the justice's order, the sessions have no power under 18 Eliz. c. 3. to commit

(1) The words in 6 Geo. II. c. 31. s. 1. state the condition of the recognizance "to appear at the next general quarter sessions, &c. and to abide and perform such order or orders as *shall be made* in pursuance of an act passed in 18 Eliz." The condition under this act therefore seemed to extend the security to the performance of an order made out before two justices of sessions, as well as to one made there; but the use of the word "then," in 49 Geo. III. seems to confine the security.

(2) See ante, 250.

mit for disobedience to their order made upon that appeal (1). The remedy is upon the recognizance which the statute directs to be taken by the two justices who make the order, which, if the party will not enter into, the justices may commit him (2). If the justices neglect to take a recognizance, that does not give the sessions a power to commit, which the statute does not give them (3). But 49 Geo. III. takes away the right of appeal, unless security is given to try it, and pay such costs as shall be awarded by the sessions.

disobedience of their order on appeal from one justice, under 18 Eliz. c. 3. Remedy on recognizance.

And where the sessions proceed under 3 Car. I. c. 4. to make an original order, they may commit for the non-performance. (4)

May commit when order under 3 C. 1. c. 4.

V. *Of enforcing Obedience by the Court of King's Bench.*

If an order is removed into the King's Bench, and confirmed there, an attachment lies for non-performance, and therefore that court will not take security of the party for the performance. But if the original order had been at the sessions, not removed into the King's Bench, the court would take security of the party to appear there. (5)

K. B. takes no security where order confirmed, but attaches for disobedience; otherwise if original order unremoved.

The court will, when it quashes such orders as bad, bind the defendant to appear at the next sessions and abide their order (6). But where the court thinks such an order good in substance, although partially defective, and void *pro tanto*, they will not quash it *in toto*, for the

Will not quash where partially bad.

(1) Per Holt, C. J. Reg. *v.* West, ante, 291. (5).

(2) Ib. and Reg. *v.* Weston, Salk. 122.

(3) Eod. Jud. ibid.

(4) Reg. *v.* West, and see Reg. *v.* Weston, supra, (2), which seems the

(5) Reg. *v.* Chaffey, 2 Ld. Raym. 858. 3 Salk. 66.

(6) Rex *v.* Gibson, Black. Rep. 198. See Rex *v.* Albertson, 2 Salk. 483. 1 Ld. Raym. 395. Rex *v.* St. Mary's Nottingham, 13 East, 57. ante, 283. (1).

 purpose

purpose of enabling the parish to take another security from the defendant to abide a better order. (1)

Quære, whether the recognizance does not continue in force

Although the court of King's Bench does not take security for the preformance of an order confirmed there, yet, if a recognizance has been taken in the court below, it seems to continue in force, so as to entitle the parish to their remedy thereupon, for any subsequent disobedience of the order.

VI. *Of proceeding upon the Security given the Parish, or the Recognizance, and what shall amount to a Breach thereof.*

Obligation of the parish.

If the order of filiation and maintenance is valid, either through the party's acquiescence, or the court's judgment, the parish, if they have obtained a bond, or recognizance, may proceed upon it, so soon as they sustain any loss or damage by maintaining the child (2). For the remedy against the parents is only in aid of the parish, and does not supercede its obligation to maintain the infant as one of the settled poor, so long as it is incapable of providing for itself.

Continues notwithstanding an order on the parents.

Proceeding upon bond.

The proceeding upon a bond of indemnity is by action of debt, brought against the putative father or his surety, or both, according to the form of the obligation and the plaintiff's discretion.

Upon note.

When the parish officers have taken a promissory note, it is by action of assumpsit.

(1) Rex *v.* Fox, as reported by Lord Kenyon, C. J. 6 Term Rep. 148.

(2) See ante, 291.

The

The proceeding upon a recognizance is by moving the court of quarter sessions, where it is filed of record, to estreat it into the court of exchequer. If the motion be granted, the recognizance is returned of course, by the clerk of the peace, into that court, to be recovered there for the crown's benefit. Upon recognizance.

Whatever amounts to a breach of the condition of the bond, is likewise a disobedience of an order made under 18 Eliz. for the child's maintenance, so that the same facts which give the parish a remedy upon a bond, entitle it to proceed for a forfeiture of the recognizance where the default arises from a neglect to provide for the child. (1) Neglect to maintain, is a breach of a bond, and recognizance.

It appears, from what has been said, that two circumstances must concur to entitle the parish to proceed in either case: 1st, That the parish has been put to costs and charges for the child's support. 2d, That the expence was not incurred voluntarily, but was a necessary payment in discharge of their legal obligation to maintain it. To proceed on either, it must be proved, 1st. That parish put to expence of maintenance. 2d, That it was not voluntary.

The first point is a mere question of fact, which admits of easy proof. The chief question therefore is, what amounts to such a voluntary payment as exonerates the father and his surety from their obligation to reimburse the parish?

The defendant was apprehended under 6 Geo. II. and gave a bond to indemnify the parish of W. against the Instance of voluntary payment.

(1) There is another ground for proceeding upon a recognizance, viz. if the defendant does not appear at the sessions, conformable to the condition, whereby it becomes also forfeited, and is estreated as a matter of course without motion of counsel.

expences

expences of a child likely to be born a bastard. The mother removed voluntarily to the parish of G. and was delivered there, but returned to W. the place of her settlement, carrying her child with her, where she received 1s. 6d. weekly from the overseers of W. for the maintenance of herself and child. An action being brought by the overseers of W. against the father's surety, to recover this money, the court gave judgment for the defendant. *Per* Lord Mansfield, C. J. — The payment by the parish officers of W. was doubly voluntary; first, because there had been no order upon them to pay (1); and, secondly, because they were not liable to maintain the child, but the parish where it was born, and they should have applied to the officers of that parish (2). But where justices make an order requiring the parish in which the child is born, to support it in some other place, and the parish does so, the obligors are bound to reimburse the sums which have been expended in pursuance of the order. "For if a justice makes an irregular order, and instead of removing the pauper, directs the parish to pay a weekly sum, the parish is not bound to contest it." (3)

Putative father has right to care

The putative father has a natural right to the care and education of his child (4). The intention of the 18 Eliz.

(1) Quære of this, see Hays *v.* Bryant, 1 H. Black. 253. post.

(2) Simson *v.* Johnson, Doug. 7.

(3) See Allen *v.* Sir John Peshall, 2 Black. Rep. 1177. where a bond was given for the maintenance of certain paupers, but not under the statutes which relate to bastardy.

(4) Per Wright, J. Rex *v.* Cornforth, 1 Bott, 459. Pl. 573. But this seems confined, by Lord Mansfield, to cases where an order of bastardy has been made upon him; the chief justice stating, that "neither the putative father nor mother have the legal right of guardianship." Rex *v.* Felton and Wenman, 1 Bott, 494. Pl. 639. But quære, whether the right may not differ as between the father and a third person, and between him and the mother; and how far the child, being within or beyond the age of nurture, makes a difference in the latter case? See post.

was to provide for the bastard, and at the same time to indemnify the parish; and the law could never think of taking the care and education of children from their parents; nor could this enter the mind of a judge (1). A putative father has a right, therefore, to take his natural child from the custody of the parish, and maintain it himself (2), and the parish cannot insist on his paying towards the maintenance while in his custody. (3)

of the child, and may take it from the parish.

If, therefore, the father offer to take and maintain the child, and the parish chuse to support it, they cannot proceed against him upon his bond, where he has given one; but he may plead it in bar to any breach of the condition averred subsequent to the offer. (4)

If the father offers to maintain his child, and the parish continue to support it, he is not liable on his bond. Quære, if on his recognizance.

It has been said, indeed, that as to the father's taking him (the child), he ought to have done it at first; and by suffering the order to be made, it shall be deemed a refusal in law; beside, he shall not then be suffered; he may sell him, or make away with him, as too often happens. (5)

It may be necessary to determine, in some cases, whether the putative father or the mother is entitled to the custody of their natural child. For if the father be entitled and

In what cases the father or mother entitled

(1) Per Lee, C. J. Newland *v.* Osman, 1 Bott, 460. Pl. 474.

(2) Ib. and Rex *v.* Felton, 1 Bott, 495. Pl. 639.

(3) Per Lord Mansfield, C. J. Rex *v.* Felton, ante, (2), and post. 300. (3).

(4) Newland *v.* Osman, ante, (1), and see Richards *v.* Hodges, 2 Saund. 83.

(5) Reg. *v.* Smith, Case Sett. Pl. 64. But these remarks were made with reference to the form of the order, and not to a proceeding upon a security given to indemnify the parish, to which it seems inapplicable. And where there is an order of maintenance directing the defendant to pay so much a-week, an order of sessions directing that the payment shall cease upon his taking his child, it is bad; for the sessions have no authority to supersede the original order. Rex *v.* Arundell, 1 Sess. Cas. 294.

offer

to care of their natural child.

offer to take and support it, he cannot be considered as forfeiting his bond or disobeying an order of maintenance, by a subsequent refusal to contribute to maintain it, while in the mother's custody, any more than if it remained with the parish officers. But if the mother be entitled to the care and superintendance of her infant, it seems as if he must contribute to support it so long as the law permits it to remain with her for nourishment and protection. (1)

Opinion how far the father or mother entitled to care of an illegitimate child. Lord Mansfield.

On a motion for an information against the defendants, for taking away a bastard child from its mother, and delivering it to the father, a man of fortune, Lord Mansfield said, neither the putative father, nor the mother, had the legal right of guardianship (2); and if the putative father, having an order of bastardy made on him to contribute to the maintenance of the child, has a mind to take the child and provide for it, the parish cannot insist on his paying towards the maintenance while in his custody; and that, he thought, in this case, where the justice had ordered the child to be delivered to the mother, he (the justice) had done wrong, the father being in good circumstances, and the mother poor; and that the circumstances should direct in these cases. (3)

Willes, C.J.

In another case, Chief-justice Willes said he would give no opinion whether the father had any power over a child who is *nullius filius*. Grotius says truly, that the mother is the only certain parent; and an order

(1) See Hulland *v.* Malkin, 2 Wils. 126. where the court declined giving an opinion.

(2) See Horner *v.* Liddiard, ante, Vol. i. 266. (1).

(3) Rex *v.* Felton and Wenman, 1 Bott, 495. Pl. 639.

of justices to remove the mother always removes the child. (1)

Mr. J. Foster also seemed to think, that the care of educating bastard children is not to be considered as a burthen to the parish, but as a trust; and that it should not be so easy for the father to take them out of their care and custody. The statute is express, that the justices shall order the father to contribute to the parish for the maintenance of the child. (2) Doubts of Foster, J.

But a child of three years of age being brought up (at the instance of her mother, on an *habeas corpus*,) by the father, on whom an order of filiation had been made, and who had obtained possession of it by fraud, it was objected to the child's being restored to the mother, that having been adjudged the child of S. he had a right to the custody of her. But Lord Kenyon, C. J. said, "that the putative father had no right to the custody of the child;" and she was accordingly restored to the mother. (3) Delivered to the mother where father obtains possession by fraud;

Subsequent to this case, upon a motion for a writ of *habeas corpus* to the defendant, to bring up the body of a bastard-child five years old, which a young woman had had by the defendant, Lord Kenyon, C. J. — "Take a rule. Where the father has the custody of the child fairly, I do not know that this court would take it away from him; though I do not mean to impeach the propriety of the case cited (4). But, where he has got pos- or by force. But quære if the father has the custody fairly.

(1) Hulland *v.* Malkin, 2 Wils. 126. ante, 300. (1). But this last observation also applied to the case of legitimate children within the age of nurture.

(2) Newland *v.* Osman, 1 Bott, 460. Pl. 574.

(3) Rex *v.* Moses Soper, 5 Term Rep. 278.

(4) Rex *v.* Soper, ante, (3).

session

session of the child by force or fraud, as is here suggested, it will interfere to put matters in the same situation as before." (1)

And it seems settled by the following case, that the mother is entitled to the custody of her infant illegitimate child, at least where no order of filiation has been made upon the father.

On application for an *habeas corpus* in the court of common pleas, to bring up the body of an infant illegitimate child, to restore it to the mother, it appeared by the affidavits, that the child had been placed, by consent of the father and mother, under the care of a nurse; that it was afterwards removed by the father to another woman; that the father then went abroad, having entrusted Mr. B. a friend, with the superintendance of the child; that Mr. B. (to whom the writ was prayed to be directed) wished to have the child placed with some person where the mother could have access to the child, and, under these circumstances, was willing to pay for its maintenance, but the mother insisted upon having it delivered up to her. On the child being brought up under the writ, Mansfield, C. J. "There is no affidavit before the court to shew any ground of apprehension that the child would incur any danger from being left with the mother. It is not unlikely, indeed, that by granting this application we may do a great prejudice to the child, but still the mother is entitled to the child, if she insists upon it.

(1) Rex *v.* Mosely, 5 East, 224. n. a. This doctrine was confirmed by the Court in Rex *v.* Hopkins, in which case the bastard within the age of nurture, being taken first by stratagem, and again by force from the mother, was on the authority of the foregoing case restored to her quiet custody. The Court declaring, that they left to the proper forum the decision of any question touching the right of custody and guardianship of the child, with which they did not meddle. Rex *v.* Hopkins, 7 East, 579.

The

The application in this case may here arise from pure affection, and the mother may be disposed to take care of the child, but it is not probable that it will be so advantageously brought up under her care as under the care of some person whom the father approves of. It often happens that the mother insists upon the custody of the child, not so much out of regard to the child itself, as with a view to make the father pay a sum of money towards its maintenance and education. Nevertheless, the mother must have the child, unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother." (1)

Order that child should remain till the mother and father contribute to support it, seems good.

It is observable, likewise, that in a more ancient case, no objection was taken on this ground to an order of magistrates directing the mother to have the care of the child until seven years old, and the father to contribute to the maintenance for that time: but it was quashed for another defect. (2)

Parish must provide for necessitous bastards without an order.

Must maintain one while residing in

Wherever the child stands in need of support, the parish officers are under a legal obligation to provide for it; and a justice's order is neither necessary to make them liable, or entitle them to have recourse to the security, in order to reimburse their expences (3). And their obligation extends to maintaining the child in another

(1) Ex parte Ann Knee, 1 New Rep. 138. By the law of Scotland, the mother is entitled to the care of her bastard child though past seven years of age. Short, contra Donald, 3 Dict. Dec. 69. or although the father has been previously decerned by the justices of the county, in a certain yearly aliment, which aliment the mother may recover, although the father offers to take, maintain, and educate the child. Burgess *v.* Haliday, ib.

(2) Rex *v.* Willey, 1 Bott, 490. Pl. 632. But the father did not claim to keep it.

(3) Hayes *v.* Bryant, 1 H. Black Rep. 253. And see Simpson *v.* Johnson, Doug. 7. ante, 298. (2).

parish,

another parish for nurture.

parish, where it remains with the mother, being her place of settlement for the purpose of nurture. (1)

Continues only while child chargeable.

But it is otherwise if the child resides there for any other purpose; and the obligation ceases altogether when it acquires a settlement in another parish. (2)

Party can be held to bail in bond only for damages sustained. But he may pay the entire penalty.

It is to be further observed, that where an obligor is arrested on the bond, he cannot be held to bail for the penalty, but for the damages actually incurred (3); and he may pay the whole penalty to the parish (4), or (in the case of an action) into court, and thus get rid of his obligation altogether; for the penalty is in the nature of stated damages, ascertained by consent of the parties, payment of more than which cannot be required. (5)

VII. *Of the Remedy by Sale of Part of the Father or Mother's Property.*

Remedy under 13 & 14 C. II. c. 12. s. 19.

If the putative father and the mother are persons of sufficient substance, the churchwardens and overseers of the parish may apply to two justices of the peace, to enable them to seize so much of their goods and chattels, and receive so much of the annual rents and profits of their lands, as shall be ordered by the said justices, for or

(1) Rex *v.* Hemlington, Cald. 6. and the cases there cited, and see Shermanbury *v.* Bolney, Carth. 279. That the place of settlement must maintain legitimate children, dwelling with their mother in another parish for the purpose of being nurtured.

(2) Quære, whether the bond or recognizance are not put an end to by the child's having gained a settlement in the native parish, by reason of some subsequent right, as by service, or apprenticeship, or if a female marries a man settled there, &c.

(3) Kirk *v.* Strickland, Doug. 449. ante, 279. (1), &c.

(4) But see Cole *v.* Gower, 6 Term Rep. 110. and the other cases cited ante, 289. (2).

(5) Brangwin *v.* Perrot, 2 Black. Rep. 1190.

towards

towards the discharge of the parish, and the bringing up and providing for the child.

This order must be confirmed at sessions, and *thereupon* the sessions are to make a further order for the overseers to dispose of the goods by sale or otherwise, or so much of them for the purposes aforesaid, as the court shall think fit; and to receive the rents and profits or so much of them as shall be ordered by the sessions. (1)

An order by which the churchwardens and overseers were directed to seize what they themselves should think proper, of the defendant's goods, to secure the parish from the maintenance of the child, was quashed as bad. Because by 13 & 14 Car. II. c. 12. the justices have only authority to make an order enabling the churchwardens to seize what the justices should think proper. (2)

IX. *Of Indictment.*

If an order has been made, and the party disobeys, he is liable to be indicted in the same manner as for disobedience of any other order, made either in or out of sessions by magistrates possessed of competent authority (3). And the parish are not prevented from proceeding to enforce an order by these means, although a recognizance which has been taken is forfeited. and the penalty recovered in

(1) 13 & 14 Car. II. c. 2. s. 19 The provisions of this statute correspond with those of 5 Geo. I. c. 8. which is copied from it, and it seems as if they must be construed in the same manner. For the construction of 5 Geo I, see Stable v. Dixon, ante.

(2) Reg. v. Chaffey, 2 Ld. Raym. 858. See also Stable v. Dixon, ante, 239. (1).

(3) Ante, 235. and query, Whether this remedy is altered to any and what extent by 49 Geo. III. c. 68 s. 3.

 the

the exchequer. For the disobedience is a crime, and, as such, becomes the subject of specific punishment. The recognizance is taken as a pecuniary caution from the party, to ensure his obedience; but its being forfeited by an act of disobedience, does not get rid of the crime. It is like the case of security taken to prevent a breach of the peace. If the party break the peace afterwards, his recognizance is forfeited, but that does not prevent his being indicted for an assault.

SECT. XI.

Of the Punishment of the Mother and reputed Father.

GETTING an illegitimate child was not punishable as a crime at common law (1). But the 18th of Elizabeth expressly considers the producing bastards as an offence; not only the getting or bearing the child, but the leaving it to be a burthen on the parish, and defrauding the relief of the true poor of it. Therefore the justices may order a proper punishment of the parents, and also take order for maintaining the child in relief of the parish. They may do either or both (2), but "the statute seems only to go to the punishment of the parents, for the purpose of securing an indemnity to the parish." (3)

The words of 7 Jac. I. c. 4. are, "That every lewd woman which shall have any bastard *which may be chargeable to the parish*, the justices of the peace may commit," &c. From which words Lord Coke infers, that "if she will discharge the parish of the keeping of the bastard,

(1) Per Lord Mansfield, Rex *v.* Westmeon, Cald. 129. See also Rex *v.* Bowen, 5 Term Rep. 156.

(2) Per Wilmot, J. Rex *v.* Ellen Taylor, 3 Burr. 1679. ante, 291.

(3) Per Lord Mansfield, Rex *v.* Westmeon, ut supra.

she

she cannot be punished by this statute, but by that of 18 Eliz. c. 3."(1)

It was also held upon 7 Jac. I. c. 4. that the mother of a bastard child should not be punished upon that statute, as for her second offence, unless she has been before questioned and punished for her first offence. She might have been punished for her first offence, either by the statute 18 Eliz. c. 3. or 7 Jac. I. c. 4.; but is not to be punished by the 7 Jac. 1. c. 4. s. 7. as for her second offence, unless she has been before punished for her first; but this second offence shall be now taken and deemed as her first offence, and so is to be punished for the same according to law. (2)

Under 7 Jac. I. c. 4 first offence is that of which she is first convicted

It had likewise been resolved by the whole court, that in cases of bastardy, "the justices have not authority to commit the woman to prison for life, for the first offence." (3)

But 50 Geo. III. c. 51. sect. 1. repeals so much of 7 Jac. I. as relates to the commitment of women to the house of correction, there to be punished and set on work for having bastards who may be chargeable to the parish.

50 Geo III c 51

Sect. 2. impowers any two justices before whom she shall be brought to commit her to the house of correction for the district or place (4), there to be set at work for any time not exceeding 12 calendar months, nor less than six weeks.

(1) 2 Inst 733. and that the parents are not punishable under 18 Eliz. unless the child be chargeable to the parish Lightfoot v. Pigot; 1 Roll Abr. 57 Pl. 12 Winter v. Barnard, ibid. Macksey v. Mazey, Comb 434. Per Lord Mansf.] Rex v. Westmeon, ante, 306. (1), and see Crompt. 196, s 8 Dalt. c. 11.

(2) 1 Bulst. 348.

(3) Slater's case, Cro Car 471.

(4) Ib. ut videtur, in which the parish is situate. See sect. 3.

Sect. 3. enables any two justices, at any petty session for the division in which the parish to which the bastard may be chargeable is situate, upon their own knowledge, or certificate duly authenticated from the keeper of the house of correction, in which the woman shall have been confined not less than six weeks, of her good behaviour during her confinement, and the reasonable expectation of her reformation, by warrant under their hands and seals, to order her immediately, or at the time to be appointed in such warrant, to be released from further confinement.

Sect. 4. prohibits her commitment until she has been delivered for one calendar month.

CHAPTER XXXIII.

Of Parish Apprentices.

MUCH of the law respecting apprentices has been discussed when treating of settlements gained in that capacity. (1)

The remaining question respects the binding out apprentices by the parish, as the means of providing for their education and maintenance. It is regulated by 43 Eliz. c. 2. s. 1. 5. 8 & 9 W. III. c. 30. s. 5. 18 Geo. III. c. 47. 20 Geo. III. c. 36. 32 Geo. III. c. 57. and 42 Geo. III. c. 46. Statutes respecting parish apprentices

SECT. I.

Of the Power to put out Apprentices; who may be compelled to serve, and whom.

IT is in the discretion of the churchwardens and overseers (as appears by the preamble 43 Eliz.) to select for this purpose such children as they shall think their parents are unable to maintain. (2) 1. Of the condition of those who are to be bound. Churchwardens to select.

(1) Ante. vol 1. chap. xxi.

(2) Per Holt, C. J. Rex v. Crosse, Comb 289. 1 Bott, 608. Pl. 842. In answer to an objection to an indictment for refusing an apprentice, "That it was not averred that the parents were not able to maintain the child."

But

Justices to consent.

But this must be with the consent of two or more justices, in whom the statute vests the power to make an order. (1)

Apprentice's age immaterial.

The age of the apprentice is of no importance. No age is mentioned in the 43 Eliz. c. 2. or in the 8 & 9 W. III. c. 30. which gives the appeal, and compels the master to receive the apprentice. The statute 5 Eliz. c. 2. mentions ten years of age; but that respects apprentices in husbandry, which may require greater bodily strength than most other occupations, such as a female child bound to housewifery; and the statute 5 Eliz. c. 2. cannot be connected with 43 Eliz. c. 2. which is for the sustenance of the poor. In other instances, the legislature has not considered seven as too tender an age. The children of vagrants may at that age be bound out; and the strength and ability of children, which, from seven years of age to ten, must vary greatly in point of fitness in this respect, is matter of consideration and discretion in the magistrates; and, independent of any statutable regulation, seven years is at common law the age of puberty. It was held therefore, that a girl of eight years old might be bound out as an apprentice, to be brought up in housewifery, and that the master might be compelled to take her. (2)

Condition of the master

So the condition of the master is immaterial. A female may be bound apprentice by the parish to a day labourer, to learn housewifery; and it will be good, unless it is found to be fraudulent. (3)

(1) Ib. and see ante, vol. i. 456. Rex v. Clapp, 1 Term Rep. 107.

(2) Rex v. Saltern, Calt. 444. And see ante, 45. et 309.

(3) Rex v. St. Margaret's Lincoln, Burr. S. C. 728.

SECT.

SECT II.

Who may be compelled to take an Apprentice.

THE 43 Eliz. c. 2. s. 5. directs the parish officers to bind the children of poor persons "where they should see convenient." This has been held to give a power to bind them to all inhabitants; and also to all occupiers of lands within the parish, although residing out of it. For the general proviso of the statute was to make a provision for the maintenance of the poor; and the first clause, in mentioning those who have to contribute to such maintenance, describes two sorts of persons, namely, *inhabitants and occupiers of lands, &c.* Amongst other provisions for the poor, the fifth section gives power to the parish officers, with the assent of the two magistrates, to bind poor children apprentices *where they shall see convenient.* It is true, indeed, these words cannot be taken so generally as they purport, because they cannot compel mere strangers, who stand in no relation to the parish, to take such an apprentice; but I think that the context of the statute furnishes the means of circumscribing the general extent of these words; and that context I took from the sixth clause, which imposes other burthens of the same nature on occupiers of lands, &c. as well as inhabitants. The general object of the act was to compel all those who had any property in the parish, to contribute their due proportion towards the maintenance of the poor; and the receiving apprentices is one mode of contributing to their general relief. (1)

43 Eliz. c. 2. 1. All inhabitants or occupier of lands. 2. Occupiers [illegible]

But mere strangers not compellable to take them.

(1) Per Lord Kenyon, C. J. Rex. v. Clapp, 3 Term Rep. 107. But Rex v. Cloverly, 1 Bott, 587. Pl. 786. is contra.

But it is said, that if this construction be put upon the statute, the party may be doubly charged: in the parish in which he lives, in respect of his inhabitancy; in that in which he has lands, in respect of his occupation of them. But if he find himself aggrieved, he may appeal to the sessions, and we must take it for granted that the justices will do what is right. They are to adapt the charge to the size of the property that the person possesses; and these are incidental charges which fall on him in respect of that property. (1).

So of apprentices put out by incorporated districts.

The law is the same as to apprentices, bound according to the 20 Geo. III. c. 36. which passed for obviating doubts touching the binding and receiving of poor children apprentices, in pursuance of acts made for relief of the poor, *within incorporated hundreds, or districts.* It enacts that "nothing in the act shall be construed to compel any person to take any such poor child apprentice, unless such person shall *be an inhabitant,* and *occupier of lands, &c. in the parish to which said child belongs.*" But the use of the words inhabitants and occupiers, does not extend the meaning more than if the term, inhabitants, which occurs in 43 Eliz. c. 3. had been only employed (2). "The word has been held not to be confined to resiants. And Lord Coke, in his reading on the 22 Hen. VIII. c. 5. relative to the repairing of bridges, by the inhabitants of counties, says, that the word, inhabitants, includes those who occupy lands in the county, though they do not reside there. For some purposes, inhabitants and occupiers are synonimous terms. Where a person derives a benefit from property, which he occupies in a parish, he is liable to contribute to the ease of it." (3)

(1) Lod. Jud. Ibid.

(2) Rex v. Tarlstead and H.pping, 2 Term Rep. 521.

(3) Per Lord Kenyon, C. J. ib.

And

And a person is equally liable where he resides out of the parish, and occupies premises within it jointly with others who dwell there, and have apprentices bound to them. B. was a partner with eleven others, in a manufactory of earthen ware, in the township of H. The partnership was rated for lands and buildings in H. to the amount of 270l. a year, of which 23l. a year is the appellant's share. Two of the partners resided within the township, and had each of them an apprentice. B. resided in L. a township adjoining; and upon a poor child from H. being appointed and tendered to him to be his apprentice individually, he appealed. But the court of quarter sessions, and afterwards the King's Bench, upon a case stated, held him liable to take one. For the appellant occupied lands in the parish to the amount of 23l. *per annum*, that being his aliquot part of the whole; and in respect of that occupation, he is bound, according to the case of Rex *v.* Clapp, to take the apprentice (1). It is not an occupation of the partnerships' land and houses by two of the partners, to the exclusion of the rest. Each may reside there if he pleases. (2)

3 Joint occupiers, whether residing within or without the parish, are severally liable.

And land is not the only property, in respect of which a person becomes liable to receive an apprentice. An inhabitant was held liable to receive one, for the sheaf or great tithes of the parish, although the case stated that, in respect of the said tithes, no apprentice had heretofore been bound; but that the custom of binding in that parish had been upon lands of ten pounds *per annum*, and upwards. (3)

4 Occupier of tithes liable, and a custom to the contrary immaterial.

No case determines whether an inhabitant of sufficient ability, but without real-property in the parish, be compellable to receive an apprentice. But the principle of

5 Quære, whether inhabitants in general liable.

(1) Rex *v.* Barwick, 7 Term Rep 33.

(2) Per Lawrence, J. Ibid.

(3) Rex *v.* Saltern, Cald. 444.

those

those already cited, namely that this is one mode of contributing to the sustentation of the poor, seems to extend to such cases, and decide, that all who are liable to contribute to the relief of the poor of the parish, must receive apprentices, provided they are enabled by their circumstances to do so. Indeed it seems to have been determined that clergymen are compellable to take them, or at least are chargeable to contribute towards putting apprentices out.(1)

6. A binding to a stranger residing in another county is valid.

A person who is neither an inhabitant nor occupier of property in the parish cannot be compelled to receive an apprentice from it; yet, if he consent to take one, the binding is good, and confers a settlement (2), although the master reside in a different county.(3)

SECT. III.

Of compelling Masters to provide for their Apprentices.(4)

Justices might compel master to take apprentice prior to 8 & 9 W. III. c. 30.

It seems to have been the better received opinion, that the justices might force a master to take an apprentice, prior to 8 & 9 W. III. c. 30.; for a power to compel the master to receive him, is consequential to the authority given the justices by the statute to put him out (5). But the point was considered as doubtful, and Lord Kenyon,

(1) 1 Bott. 608. Pl. 841. cites Dalton, who states it upon credible information, as the opinion of all the judges.

(2) Rex v. St. Margaret's, Lincoln.

(3) Rex v. St. Nicholas, Nottingham, 2 Term Rep. 726.

(4) As to discharging an apprentice from his indentures, see ante, Vol. i. Chap. xxi. sect. 3. 488.

(5) Anon. Salk. 67. Rex v. Gillifer, 1 L. Raym. 65. 1 Lev. 84. S. C. Henton v. Steers, T. Raym. 65. in marg. Rex v. Fairfax, 1 Show. 76. 3 Mod. 269. S. C. But see Rex v. Trevilian, 2 Str. 1268.

Kenyon, C. J. observes, "masters could not be compelled to provide for their apprentices under 43 Eliz. and the statute 8 & 9 W. III. c. 30. was made for the purpose.(1)

But not to provide for them.

It seems to have been held in one case *prior* to 8 & 9 W. III. c. 30. that as the statute has intrusted the *churchwardens and overseers* of the poor, by and with the approbation of two justices, to bind apprentices, the child must appear upon the face of the order to be put out by the assent of the churchwardens as well as the overseers; and the churchwardens not being mentioned in that order, it was quashed (2). This determination proceeds on the ground that the churchwardens are to be considered as an integral part of the parish officers (3), and as having in this

(1) Per Lord Kenyon, C. J. Rex *v.* Leighton, 4 Term Rep. 732. ante, Vol. i. 464. A similar act was passed relative to incorporated districts, 20 Geo. III. c. 36. See Rex *v.* Tunstead and Happing, 3 Term Rep. 523. ante, 183. (2).

(2) Rex *v.* Fairfax, 3 Mod. 269.

(3) Per Lord Kenyon, C. J. Rex *v.* Beeston, 3 Term Rep. 592. where the same great judge doubts the authority of that case. But the reports of it, Show. 76. Comb. 164. Carth. 94. state the order to be quashed on other grounds, and not upon this one. In Rex *v.* Beeston, supra, Lord Kenyon expressed himself thus, as to the power of the majority of parish officers to bind the whole. "I do not mean to say, that the churchwardens and overseers are technically a corporation: but as far as concerns the regulations of the poor of the parish, they stand in pari ratione. And in the instance of corporations, the act of the majority binds the whole; so much so, that the court will compel the person who has the custody of the corporate seal, to affix it to any act, according to the vote of the majority, though against the consent of such person, as was done in the case of Wadham college, Cowp. 377. However, I do not go on the grounds of this similitude; but the foundation of my opinion is this, the 43 Eliz. c. 2. has directed that the general acts to be done by the churchwardens and overseers, shall be done by the majority of them, and I think that the spirit of that statute pervades all the subsequent acts respecting the government of the poor. Besides, in common understanding, what is required to be done by the churchwardens and overseers, is satisfied by being done by a *majority*. And indeed, if we were to determine otherwise, the inconvenience would be so great as to make it necessary for the legislature to interfere and pass another law,

this particular instance a discretionary power, separate and independant from that of the overseers chosen by the parish.

Master must provide for apprentice. But justices cannot order wages or money at the end of apprenticeship.

When an apprentice is effectually bound, his master takes him for better or worse, and is to provide for him in sickness and in health (1). But the justices cannot order him wages during the term of his apprenticeship, or any thing to be given him after the term is ended (2). And if the master dies, neither his executors nor administrators are compellable, by a justice's order, to receive and provide for an apprentice, either as a pauper (3), or, if bound under 5 Eliz. c. 4. as an apprentice (4); because an apprenticeship is a personal trust between master and servant, and determined by the death of either; for instruction, which is the end and design of the apprenticeship, cannot be obtained from the personal representative (5). But covenant lies against the executor, in which there is no inconvenience, as the executor may make his defence by pleading no assets; or debts of an higher nature. (6)

The

law. The Court therefore held, that the assent of the majority of parish officers, was sufficient to bind the whole in a contract for maintaining the poor, under 9 Geo. I. c. 7. post. Chap. xxxiv. s. 2. As to how a certificate is to be signed by them, see ante, 149. et seq. also ante, Vol. i. 55.

(1) Rex *v.* Hales Owen, 1 Str. 99. See also Rex *v.* St. Nicholas, Nottingham, 3 Term Rep. 726. ante, 452. (3), and 141. n. (6).

(2) Rex *v.* Wagstaff, Fol. 225. 1 Bott, 609. Pl. 846.

(3) Rex *v.* Petty, 1 Show. 405.

(4) Rex *v.* Peck, 1 Salk. 66.

(5) Ibid.

(6) Per Eyre, J. ibid. But now by 32 Geo. III. c. 57. s. 1. covenants for maintenance of parish apprentices, with whom no more than 5l. is given, are to continue in force no longer than three months after the master's death. By sect. 2. the surviving husband or wife, or a son, daughter, brother, sister, executor or executrix, administrator or administratrix, of the master or mistress (having lived with, and become part of their family, at the time of the death,) may, within the three months, have such apprentice assigned to them by two justices. By sect. 3. the same provisions are extended to the case of that master's death, &c. to whom the

apprentice

The 8 & 9 W. III. c. 30. enacts, that if the master does not receive and provide for the apprentice, or refuses to execute the other part of the indentures, he shall forfeit for every such offence 10l. to be levied by distress and sale, for the use of the poor where such offence was committed (1). But it seems further, that an indictment will lie for disobedience, either in case of not receiving, turning off, or not providing for such apprentices as the law requires to be received. (2)

10l. penalty for not receiving an apprentice under 8 & 9 W. III. c. 30.

Indictment lies.

But to render the indictment good, the binding must appear to be within 43 Eliz. c. 2. (3), and the sessions have no original jurisdiction to put out an apprentice, but only by way of appeal. (4)

Where binding within 43 Eliz. c. 2.

SECT. IV.

Of the Party's Redress against an Order to take an Apprentice, &c.

The 8 & 9 W. III. c. 30. gives a power of appeal to the next general quarter sessions, whose order shall be final and conclusive upon all parties. (5)

Appeal under 8 & 9 W. III. c. 30.

apprentice is assigned. But by sect. 4. if the justices shall not, in either case, think fit that the apprenticeship should be continued, it is thereby determined. For the remaining provisions of this statute, see the act itself in the Appendix.

(1) If the occupier of lands in A. resides in B., and upon application to him in B. refuse to receive an apprentice from A. quære, whether the poor of A. or of B. are to have the penalty?

(2) Reg. v. Gould. 1 Salk. 381. In Rex v. Trevilian, the court said they would not meddle with the general question, whether an indictment would lie for refusing to take an apprentice or not? 2 Str. 1268. But see Rex v. Gilliet, ante, 314. (5), and the cases cited, ib. and Rex v. Robinson, 2 Burr. 799.

(3) Rex v. Trevilian, 2 Str. 1268.

(4) Rex v. Fairfax, as reported, Comb. 164. 1 Show. 76.

(5) See Lord Kenyon's opinion, Rex v. Clap, 3 Term Rep. 107.

As

Questions discussable on appeal.

As to the merits of the case; the child's fitness or unfitness to be bound (1), or of the party to receive an apprentice, are matters of fact upon which the justices are to decide according to discretion.

Sessions may determine, that a merchant is unfit to take apprentice.

Two justices bound a poor girl apprentice to a merchant. The sessions discharged the order, because they thought it unfit to compel a merchant to take an apprentice. Their order was affirmed, because 8 & 9 W. III. c. 30. having given an appeal in this case to the sessions, it is in the discretion of the justices there to determine, whether it was or was not fitting to force an apprentice upon any one. (2)

Party when concluded from appeal.

But a party may debar himself from this right to appeal. Thus, if he execute the counterpart of the indenture, he is thereby concluded from appealing against it. (3)

Sessions state case. Order removable into K. B.

If the sessions entertain a doubt, they may state a case for the opinion of the court of king's bench (4); or, if any illegality appear on the face of the order, the party may remove it into that court to be quashed for the defect.

Order directing master to give two suits of clothes, &c. ill.

The overseers of a parish, with the assent of two justices, bound a poor child to an attorney, who appealed to the sessions. The sessions ordered him to seal the counterpart of the indenture, which he refused, and removed it (5) by *certiorari* into the king's bench. It was moved to quash the order; because, in the close of the indenture, it is said, that the master, at the end of the

(1) Rex v. Saltren, Cald. 444. ante, 310. (2).

(2) Minchamp's case, 2 Salk. 491. See also Rex v. Saltren, ante, (1)

(3) Rex v. Saltren, ante, (1).

(4) Ib.

(5) i. e. the order.

 term,

term, shall give his apprentice two suits of clothes; one for holidays, and the other for working days, which, upon debate, the court held to be ill, and quashed the order. For the justice cannot order him *wages* during the term of his apprenticeship, they must only order him *maintenance* as an apprentice, and cannot order him any thing after the term is ended. (1)

(1) Rex *v.* Wagstaff, Fol. 225. See some exceptions, where parish apprentices are discharged by a justice's order. 32 Geo. III. c. 57. sect. 11. Append.

CHAPTER XXXIV.

Of relieving and ordering the Poor.

Objects of parish relief.

THE objects of parish relief are, 1st, Settled poor. 2d, Casual poor.

I. Statutes by which relievable at their own houses.

I. They are relievable at their own houses, subject to the regulations prescribed 43 Eliz. c. 2. 3 Car. I. c. 4. s. 22. 3 W. & M. c. 11. s. 11. 8 & 9 W. III. c. 30. s. 2. 9 Geo. I. c. 7. s. 1. & 2. 9 Geo. III. c. 37. s. 7. 36 Geo. III. c. 23. s. 1. s. 2. s. 3. s. 4. & 5.

II. In workhouses.

II. In workhouses under 9 Geo. I. c. 7. s. 4. 30 Geo. III. c. 49 s. 1. s. 2. 49 Geo. III. c. 124. s. 5. 50 Geo. III. c. 50.

III. In incorporated districts.

III. In parishes incorporated either under the general statutes 22 Geo. III. c. 83. s. 1. 33 Geo. III. c. 35. 36 Geo. III. c. 10. 41 Geo. III. c. 9. 52 Geo. III. c. 75. or some special act of parliament.

IV. Of lunatic poor by 48 Geo. III. c. 96. and 51 Geo. III. c. 79.

V. In gaols by 52 Geo. III. c. 160.

Officers must relieve poor without an order.

The parish officers are under a legal obligation to relieve and support their poor in the manner pointed out

out by these statutes, without an order obtained for this purpose. (1)

But a discretion as to the mode of relief is taken away from them in some instances, and reposed in the justices, who are empowered to make an order to compel them (2), as they may in all cases within their jurisdiction, where the officers have improperly refused to relieve.

But may be compelled by order.

SECT. I.

Of the Authority of the Justices to order Relief, and the Form of the Order.

An order of relief might be made by one justice under 43 Eliz. c. 2. (3). But the power is more distinctly given by 3 W. & M. c. 11. either to a single justice or the quarter sessions (4). By 9 Geo. I. c. 7. s. 1. no justice can order relief for any poor person or persons dwelling in any parish, until oath be made that they have applied for relief to the parishioners, at some public parish meeting, or two of the overseers of such parish, and been refused, and until such justice has summoned two of the overseers, to shew cause why it should not be given, and the person so summoned hath been heard, or made default to appear before such justice.

Single justice may order relief by 43 Eliz. c. 2. Sessions by 3 W. & M. c. 11. By 9 Geo. I. c. 7. Must be oath of previous refusal to relieve, and summoning the overseers.

By 9 Geo. I. c. 7. s. 3. justices for any county, who dwell in any city or precinct that is a county of itself,

(1) Hays *v.* Bryant, 1 H. Black. 253. ante, 303.

(2) 36 Geo. III. c. 23. post, sect. 1.

(3) Per Lord Kenyon, C. J. Rex *v.* Keer and Rich, 5 Term Rep. 159.

(4) Rex *v.* Winship & Grunwell, Cald. 72.

but situated within the county at large for which they are appointed, may grant warrants, take examinations, and make orders for any matters which any one or more justice may act in, at his dwelling-house, notwithstanding that such dwelling-house is out of the county, &c. in such city or other precinct adjoining.

28 Geo. III. c. 49. sect. 4. recites, that doubts have arisen with respect to the construction of 9 Geo. I. c. 7., it enacts, therefore, "that any justice acting for any county at large, may act as such at any place within any city, town, or precinct, being a county of itself, and situated in, surrounded by, or adjoining to any such county at large, and that his acts shall be as valid as if done within the county at large. But it provides, that "nothing in this act contained shall extend to give power to the justices of the peace for any county at large, not being justices for such city, town, or precinct; or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever." (1)

Form of the order stating the jurisdiction.

The order, whether made at sessions, or by one justice, must appear to be made upon oath, that the pauper, or some other person, on his or her behalf, has applied to two overseers, or "at some public parish meeting, for relief, and has been refused (2)." It must likewise state

(1) See more as to the local limits of justices' jurisdiction, Vol. i. 222. et seq.

(2) Rex v. Winship and Grunwell, ante 321. (4). although the act mentions but one justice. Per Lord Mansfield; and see the cases cited, ibidem. (a).

the party to be poor and impotent (1), and profess to be made under hand and seal: but if that be set forth on the recital, "We, &c. whose hands and seals are hereunto set," it is sufficient. (2)

Need not aver the justice resident in the parish, &c.

The 3 & 4 W. III. c. 11. s. 11. gives no direct authority to a neighbouring justice to make an order of relief, except where none resides in the parish: the words of the statute being, "if no justice be dwelling in the parish." This has been argued, therefore, to be a declaration, that if a justice be dwelling in the parish, he only shall have cognizance of the matter, and that this being the foundation of his jurisdiction, the order ought to aver, that the justices making it lived in the parish, or that there was none living there. But it has been decided, that the statute upon this part was only directory, for which Salk. 473. was relied upon. (3)

Form as to directing relief.

Cannot order money to be paid for assistance administered to a pauper.

The order must be to pay a certain sum to the pauper weekly, &c. If it run, that the parish officers "do pay 3l. to a woman, for nursing a poor inhabitant, when ill in a gaol, and likewise for paying a surgeon's bill due to him on account of the said pauper, it is bad. For if the surgeon and nurse are employed by the parish officers, they have thereby given the party relief. The surgeon and nurse have a proper remedy by way of action against

(1) Rex *v.* Hayworth, 1 Str. 10. where an order to pay 3s. weekly to A. *so long as he should continue poor*, was quashed. Rex *v.* Stoke Ursey, S. P. Rex *v.* Tippet, East, 4 Geo. I. S. P. on an order to maintain a daughter-in-law, as to which latter, see ante, 232. (4). Quære, if not S. C. as Rex *v.* Tripping, 16 Vin. Abr. 424.

(2) Rex *v.* Woodsterton, 1 Bott, 401. Pl. 492. See ante, 184. as to an order of removal.

(3) Rex *v.* Woodsterton, 2 Barnard, K. B. 207, 240. See ante, Vol. 1, 49.

 the

the officers, and the justices have no pretence to interfere in this matter. (1)

In general poor must reside in the parish, to be entitled to relief.

If it direct the officers to repair to another parish, and relieve, it is bad.

An order cannot be made under 43 Eliz. c. 2. except to relieve the poor residing within the parish. For parishioners are not to be relieved until they are carried to their parish, which is bound to maintain them only so long as they continue there. An order, therefore, directing the parish officers of C. to repair to R. and relieve a man and his wife, being so sick they cannot be removed, was quashed as bad. (2)

Exceptions to this rule. 1st, where a child legitimate or illegitimate resides in another parish with its mother for nurture.

One case, however, has been always considered as an exception to this rule. A child within the age of nurture cannot be removed from the mother, so that if the latter be settled in a different parish from her child, and reside there, the place in which the infant is settled must maintain it, during such residence with the mother; and the law is the same, whether it be a legitimate (3) or a natural child. (4)

Some further exceptions are made to this rule by statute: 1st, As it respects the maintenance of the poor in general. 2d, As it relates to provision for the family of men serving in the militia. (5)

(1) 1 Bott. Pl. 494, and see Rex v. Smith. et al. 1 Bott, 343. Pl. 376. Rex v. Overseers Colbitch, 1 Bar. K. B. 46. and also Rex v. Belzem, St. Pauls, 11 Mod. 178. cited, 1 Bott, 402, n. (a).

(2) Clypton St. Mary v. Ravistock Poor, Sett. 49. Rex v. Houghton Le Spring, 1 East, 247. 1 Bott, 400. Pl. 490. See also 9 Geo. I. c. 7. s. 1. As to how casual poor shall be maintained, see post, 340.

(3) Shermanbury v. Bolney, Carth. 279. Rex v. Saxmundham, Fort. 307. S. C. Rex v. St. Giles in the Fields. Burr. S. C. 2.

(4) Rex v. Hemlington, Cald. 6. Simpson v. Johnson, Doug. 7. Rex v. Saxmundham, ante, (3).

(5) See post. Sect. 3. 335.

We

We have already seen, that 35 Geo. III. c. 101. s. 2. enacts, that in case any poor person shall be brought before a justice or justices, to be removed or passed, and it shall appear to the justice or justices, that from sickness or other infirmity, it would be dangerous to remove them, the said justice, &c. is required and authorised to suspend the execution of the order or vagrant pass, until he or they are satisfied it may be safely executed, without danger to those who are to be removed under it; which suspension, and subsequent permission to execute, are to be indorsed on the warrant or pass.

By 35 Geo. III. c. 101. 2d, where the poor cannot be removed.

This power to remove the suspension of an order or pass seems by this act to have been confined to the justice or justices by whom the order was originally made. But now by 49 Geo. III. c. 121. s. 1. it is made lawful for any other justice or justices, within the county or jurisdiction within which such removal or pass is made, to order that the same shall be executed, and direct the charges to be incurred to be paid, and to carry into execution such amended order as fully and effectually as these powers and authorities can be executed by the justices who make such order or the justice who grants such pass.

49 Geo. III. c. 121. s. 1.

Sect. 3. directs that when it is suspended on account of the sickness of any person thereby directed to be moved, it shall be suspended for the same period with respect to every other person named therein, who was actually of the same household or family of such sick or infirm person at the time of the order made or pass granted.

Sect. 3.

The charges proved on oath to be incurred by suspension of an order of removal, or vagrant pass, are to be paid by the parish officers of the parish or place to which such poor person is to be removed, in case any removal is

Charges how to be paid, &c.

(1) Ante, Chap. xxviii. sect. 5. p. 215.

made, or the party dies previous to the execution of the order. If the parish officers shall, upon the removal or death of the person ordered to be removed, refuse or neglect to pay the charges within three days after demand, one justice, by warrant under his hand and seal, may cause the money mentioned in such order to be levied by distress and sale of the goods and chattels of the person or persons refusing or neglecting payment, with such costs of the levy, not exceeding 40s., as the said justice shall direct. And if the parish or place to which the removal is made, or ordered to be made, be without the jurisdiction of the justice signing the warrant, it shall be transmitted to any justice of the peace having jurisdiction within such parish or place, who are authorized and required to indorse the same for execution. But if the sum ordered to be paid on account of costs and charges exceed 20l. the party or parties aggrieved may appeal to the next general quarter sessions; and if the court of quarter sessions is of opinion, that the sum awarded is more than of right ought to have been ordered to be paid, they may strike out that sum, and insert such as in their judgment ought to be paid, and they are to direct that the amended order shall be carried into execution by the justices, by whom the order was originally made, or either of them; or, in case of the death of either, by such other justice or justices as they shall direct. (1)

How where the parish ordered to pay, lies without the jurisdiction.

Appeal.

The

(1) Quære, whether the general words in the enactment, which require payment of the expences incurred during the suspension of these orders by parishes to which persons are to be thereby removed, are restrained by the recital in sect. 2. to cases where poor persons are removed or passed to the places where they are legally settled. Otherwise the parish to which the removal is afterwards made, will be obliged to pay all expences under 20l. at all events, without power of redress, even though it shall ultimately appear upon appeal, that the pauper is settled in that parish from which the removal

The party may bring this appeal within the time allowed by law for bringing appeals against orders of removals, and is not limited to three days after the costs are demanded. The meaning of that part of the clause is, that if he does not give notice of appeal within three days, he subjects himself to the inconvenience of being distrained upon for the amount, but the right of appeal being given in the most general terms by a subsequent part of the clause, is not thereby restrained. (1)

And, by 49 Geo. III. c. 124. sect. 2., when the execution of the order is suspended, the time of appealing is to be computed according to the rules which govern other like cases, from the time of serving it, and not from that of making such removal under and by virtue of it.

The justices making original order have a discretionary power. But those who should back it have none.

The justices by whom the original order is made and warrant issued, have a discretion to exercise upon the matter submitted to them; but the statute is peremptory upon the magistrates, residing in the jurisdiction where the levy is to be made, to endorse the warrant. He has nothing to do with the propriety of making the original order, or granting the original warrant, and is not

is made. In the case of vagrant passes also, the burthen of maintaining the vagrant, during his sickness, will be cast upon a parish where he not only may have no settlement, but possibly has never been.

The act also makes no provision for the suspension of orders through inevitable accident during the time the officers are putting them in execution. Thus, if a pauper is to be conveyed, under an order from Launceston to Carlisle, and is taken ill on the road, by whom is he to be maintained?

Quære also, whether the sessions have power to examine into the propriety of the order of suspensions being made at all? As for instance, if the parish appealing, should be able to shew that the paupers were neither sick nor infirm, but might have been removed without danger. The words of the act refer to an alteration in the sum only.

(1) Rex v. Bradford, 9 East, 97.

answerable for their legality, but they remain at the hazard of them by whom they were first granted. (1)

Mandamus granted to back a warrant of distress, under 35 Geo. III. c. 101. although the justice considered it illegally granted. For he has no power to judge of its legality and is not answerable for the consequences.

A rule was moved to shew cause, why a mandamus should not issue to a magistrate of the county of Essex, commanding him to back a warrant of distress, issued by the magistrates of the borough of C. for 20l. 16s. 3d. being the expences incurred by the parish of L. in the maintenance and support of D. G. and A. his wife, and for surgical assistance during the suspension of an order for removing him to his parish, and 30s. for the charge of the levy. It appeared that G. on 1st May 1791, as he was driving a waggon on the public road leading through L. broke both his legs, and was taken to the workhouse, where he continued till 31st July. On 6th May, two justices of the borough of Colchester, within whose jurisdiction the parish of L. is, took the pauper's examination, and made an order for removing him and his wife from L. to Coggeshall, in Essex, and at the same time endorsed a suspension on the order of removal; and on 31st July, the order was executed by their permission. The parish officers of Coggeshall not paying within three days, the magistrates of Colchester issued a warrant of distress, and Coggeshall not being within their jurisdiction, the parties applied to the defendant to back it, which he refused. In shewing cause against the rule, it was observed, that the order of removal was illegal, as the pauper had not come into L. to inhabit or settle, but was detained by an unavoidable accident, and fell within the description of casual poor. The Court, however, upon the reasoning before stated, thought the defendant had no discretion, and made the rule absolute for a mandamus, commanding him to sign the warrant. (1)

(1) Per Lord Kenyon, C. J. Rex v. Kynaston, 1 East, 177.

(2) Rex v. Kynaston, ante. (1).

Where

Where an order directs, that a certain sum shall be paid to the pauper weekly, and every week, it is due at the beginning of the week, and the parish officers should pay it then. (1) Weekly relief when due.

The jurisdiction to make orders for the relief of the poor by the sessions, and by a single justice, are concurrent. No appeal therefore lies against an order of maintenance; and the reason is, lest while the point is litigating, the poor should starve. (2) No appeal against order of relief.

The 9 Geo. I. c. 7. s. 4. enacted, that where any poor person or persons in a parish, in which there is a workhouse, shall refuse to be lodged, kept, or maintained there, that such person or persons, so refusing, shall be put out of the book where the names of persons who ought to receive collection are registered, and not be entitled to ask or receive collection or relief. 9 Geo. I. c. 7.

This statute was productive of many harsh consequences, notwithstanding the humane interpretation put upon it by the judges, viz. that it extended only to compel those persons of a family to go there, who were in actual want of relief. (3) Extends only to those actually asking relief.

But this provision is now altered, and a discretionary power given to magistrates, by 36 Geo. III. c. 23. (4). It is expressly enacted, however, by s. 4. and 5. that it shall not extend to places where houses of industry are 36 Geo. III. c. 23. restores a discretionary power to justices to

(1) Rex *v.* John Fearnley, 1 Term Rep. 316.

(2) Rex *v.* North Shields, Cald. 68.

(3) Rex *v.* Haigh, 3 Term Rep. 637. Rex *v.* North Shields, ante, (2) And see Rex *v.* Carlisle, 3 Burn's Justice, tit. Removal.

(4) For the remedy to enforce obedience to orders of maintenance, see post, Chap. xxxvi.

pro-

order relief at the dwelling of the poor. But not where there are houses of industry.

provided, under 22 Geo. III. c. 83. or under any special act.

Or hundreds incorporated by a particular act.

Where, therefore, 4 Geo. III. c. 90. was passed, for incorporating two hundreds, and directed that a house should be built for the poor's reception, and provided that, three months after the house should be built, "the said poor persons, and persons incapable of providing for themselves, *should be under the government and management of the said guardians of the poor,*" it was held that this excluded the magistrates of the county from any jurisdiction to make an order for the relief of poor living within that district. (1)

SECT. II.

Of Workhouses.

Parishes are not compellable to erect workhouses, but may maintain and employ their poor at their own homes. (2)

Under 9 Geo. I. c. 7. majority of officers may hire workhouse, or purchase with consent of major part of parishioners.

The 9 Geo. I. c. 7. s. 4. enables the parish officers, with the consent of the major part of parishioners, to purchase or hire a house, &c. and contract with any person for maintaining and employing the poor. But the concurrence of all the parish officers is not necessary to make the contract valid, the assent of the major part is sufficient, although the rest refuse to join. (3)

(1) Rex *v.* Keer and Rich, 5 Term Rep. 159. 1 Bott, 410. Pl. 501.

(2) Per Buller, J. Rex *v.* Wetherill, Cald. 432.

(3) Rex *v.* Beeston, 3 Term Rep. 592. 1 Bott, 408. Pl. 500.

Two

Two justices by an order remove W. H. from the parish of Lyncombe to the parish of St. Peter and St. Paul, in the city of Bath; to which parish they adjudged him likely to become chargeable. The sessions on appeal confirm the order, and state the following case:—The parishioners of the parish of St. Peter and St. Paul, in conjunction with the parishioners of the parish of St. James, in the city of Bath, some time since purchased a piece of ground, situate in the parish of Lyncombe, and built thereon a house for the reception and maintenance of the poor of the several parishes of St. Peter and St. Paul, and St. James there. In September last, the pauper W. H. being impotent and unable to work, was, together with all the other paupers of the said parish of St. Peter and St. Paul, removed from thence to the said new erected house in Lyncombe, where he and the rest of the poor have been maintained at the expence of that parish, without being any expence to Lyncombe. The pauper, and all the other poor who went into the said house, carried with them regular certificates signed by the officers of St. Peter and St. Paul, and which were delivered to the officers of Lyncombe. Notwithstanding which, the officers of L. obtained an order for his removal, as not being an object of the certificate act, and therefore unprotected by it. But by Lord Mansfield; after stating the object of the certificate act: "The want of workhouses was soon felt as an inconvenience. They were not long after (*i. e.* the certificate act) introduced by the legislature; and if well regulated, a moſt desirable mode of relief they are. They supply comfort and accommodation for those who cannot work, and employment for those who can. In many instances which have chanced to fall within my knowledge, particularly on the midland circuit, they have reduced the annual amount of the poor rates one half. But this benefit could not within itself be received by every

Two united parishes may hire workhouse in a third, and if the poor reside there under a certificate they cannot be removed.

every small district; for where parishes were small, the expence of the necessary buildings was too heavy for them. This obstacle was foreseen by the legislature, and provided against accordingly. Though single parishes could only contract for these buildings within their own limits, yet where two unite, no restrictions were imposed; the power is general. It is obvious that the workhouse of a single parish must be moſt conveniently situated in that parish. Upon a similar principle, where many parishes were jointly concerned, the legislature did not require that the buildings should be raised in either of the confederate parishes; because, in such a case, a spot might be found in some other parish more centrical and better accommodated to their general convenience than any part of their united district. The act therefore authorizes the purchase any where; and when once the joint purchase is made, wherever it be, it becomes a part of the local system of each contracting parish; and if the poor will not go there, they are not entitled to relief. The same narrow spirit that has impeded the progress of this beneficial plan now starts up again to limit this power, and almost to overthrow the act itself, which was calculated ultimately to reduce expence, as well as promote industry and encourage manufactures, by employing all the poor under the eye of one master. But the objection is not warranted by the certificate act, whatever might be the leading motive in passing the act; that statute authorizes the whole body of the poor, of whatever denomination, and with whatever object, to leave their own and remove into any other parish, provided they can obtain the protection of a certificate. Contrary to the spirit and policy of the act, and not obliged by the letter, the court will not make an exception of a case which the act itself has not excepted. The true policy is certainly to enlarge, and not to narrow, the district within which the poor are

Single parishes must contract for workhouses within their limits.

United parishes may in a third.

to

to be maintained (1). As to the objection of its being an injury to property; the introduction of a numerous inhabitancy, by increasing the consumption of provisions, must unavoidably add to the value of that land, the produce of which is by such a demand consumed. As to the possibility of a few illegitimate children acquiring by birth a settlement in the parish within which the workhouse stands, it is impossible to foresee every inconvenience, and all that can be said is, that *de minimis non curat Lex.*" *Buller* J.—As to the last difficulty raised, I doubt whether the poor house so occupied, and become in this manner the perpetual property of the united parishes, is not to this purpose rather to be considered as part of those parishes to which it so belongs, than of the parish in which it is locally situated, upon the same principle as that of many resolutions in the case of such children born in gaols (2). Both orders were quashed. (3)

Quære, whether a workhouse in a third parish is not to be considered for parochial purposes as part of those parishes whose poor dwell there.

The putting people into the workhouse does not impose upon them an obligation to work if they are not qualified for labour. Every person in the workhouse is not obliged to work. Suppose a man is in a fever; were the master or keeper of a workhouse to exact labour from such a person, he would be indictable for it; and I have had several indictments of that kind before me. (4)

By 49 Geo. III. c. 124. two or more of His Majesty's justices of the peace may at their petty sessions direct

49 Geo. III. c. 124. s. 5.

(1) Peart *v.* Westgarth, ante, vol. i. 18. Accord. in Rex *v.* Leigh, ib. 26. the court seem to entertain a contrary sentiment. But see the several opinions, ante, vol. i. 26. and the cases there referred to.

(2) Ante, vol. i. 290. et seq.

(3) Rex *v.* St. Peter's and St. Paul's, Cald. 213. 1 Bott, 433. Pl. 534.

(4) Per Lord Mansfield, C. J. Rex *v.* Winship and Grunwell, Cald. 76.

such

such rules, orders, bye-laws, and regulations, or any of them, as are appointed to be observed and enforced in every poor house established under 22 Geo. III. c. 83. to be observed and executed in any parish within their respective divisions or districts, as fully as in those incorporated by that act.

50 Geo. III. c. 50. By 50 Geo. III. c. 50. two justices within their limits may at any special sessions direct the rules, orders, and regulations in the schedule to 22 Geo. III. c. 83. or any of them, with such additions as shall be made by them, to be observed and enforced in the workhouses, poor-houses, or any house set apart for the purpose, although there shall be no master or mistress to superintend the same. And two justices in any special sessions may add to and alter the rules, &c. which shall have been made at any previous special sessions, provided that no addition or alteration made by the justices shall be contradictory to the rules so established by 22 Geo. III. "and provided that the same shall not be repealed at their quarter sessions of the peace;" and for carrying those rules into execution justices of peace shall have the same powers as are vested in visitors by 22 Geo. III., and church-wardens and overseers within their respective parishes and townships as are vested in governors of the poor.

Sect. 2. By sect. 2. persons contracting for the maintenance of the poor, are with respect to all such things as they shall contract to perform and provide for the poor, made subject to the jurisdiction and orders of justices in like manner in all respects as overseers of the poor, and the orders are to be enforced, and the contractors who disobey punished, and forfeitures and penalties levied in the same way.

Sect. 4. By sect. 4. justices in special sessions, upon application by the major part of the overseers, may appoint the

the keeper of the workhouse to be the governor, who shall have, until such sessions revoke the appointment, which they are empowered to do, the same powers and perform the same duties as governors appointed by 22 Geo. III. c. 83.

By sect. 3. persons sent to the poor-house who embezzle, waste, spoil, or damage any of the clothing, goods, or materials committed to their care, or who carry any of them away which are provided for the use of the poor-house or any poor therein, without the overseer or keeper's permission, shall upon complaint on oath, and conviction by one or more justices acting for the district, be committed to the house of correction, and kept to hard labour for any time not exceeding two calendar months, nor less than seven days. Sect. 3.

By sect. 5. any breach of the rules and orders put in force by this act are to be punished in such manner as the breach of the rules and orders under 22 Geo. III. c. 83. Sect. 5.

SECT. III.

Relieving Families of Militia-men.

THE defendants were indicted for not obeying an order of a justice of peace, made under the 19 Geo. III. c. 72. directing the defendants, overseers of St. John, in the town and county of Bedford, to reimburse a sum of money advanced by the overseers of the parish of Meppershall, in the same county, to the family of a substitute in the militia of the said county, for an inhabitant of the parish of St. John: and which family, at the date of the order, dwelt in the parish of Meppershall. The

Under 19 Geo. III. an order to maintain the family of a substitute in the militia, and that upon the parish for which he serves, to reimburse this main-

tenance, should be made by the same justice and at the same time. An indictment for disobeying the order to reimburse must either set forth, or refer in general terms, to the order of maintenance.

The defendants being found guilty, it was moved in arrest of judgment, 1st, That the indictment did not set out any order of maintenance previous to the order of reimbursement, without which first order there could be no legal foundation for the last order. 2d, That the order was retrospective, being for the payment of a sum supposed to have occurred under an order of maintenance made long before; whereas the act directs, that the order shall be made at the same time with the order of relief or maintenance; and that it was for a gross sum for eighty-three weeks; and as inhabitants may change in that time, they ought not to be so charged. 3d, That it did not appear upon the face of the indictment, that the militia-man, for whom the substitute served, was balloted, or that the substitute was sworn or enrolled. Lord Mansfield—" In indictments, the crime with which the defendant is charged must appear with a scrupulous certainty: and here it is disobedience to the order of a justice. Now it must appear upon the face of the indictment that this was a legal order; for if it was not so, disobedience is no crime. Then this is an order of reimbursement, which pre-supposes an order of maintenance. Such order necessarily must be; for if the overseers had made the disbursement of their own accord, and without an order for that purpose, they could not legally be reimbursed. Such voluntary payment would not have entitled them to reclaim the sum advanced, because they are not authorized to judge of circumstances. Had the justice of peace recited the order of maintenance, it is admitted, the indictment would have been good; had he even in general terms referred to it, the Court might perhaps have presumed such an order properly made. There would then have been some colour of authority for the jurisdiction exercised; but so far from having recited it, he has not made the slightest reference to it. The indictment, therefore,

 cannot

cannot be supported. Besides the order of reimbursement is not at all connected with the order of maintenance, though the act requires they should both be made by the same justice at the same time, *i. e.* that whatever shall be paid shall be reimbursed; but this is at the distance of a year, and for a gross sum." The judgment was arrested. (1)

In a subsequent case, which was upon appeal from an order of sessions, where the order to reimburse was made four years after the order of maintenance, it was held, that the act of parliament directs in positive terms, that the order for reimbursement shall be made by the same justice, and at the same time, as the order for maintenance. There seems also good reason for requiring that to be done, as the inhabitants of a parish are a fluctuating body, and it would be unjust that one set of persons, at a great distance of time, should be called upon to discharge burthens which were incurred before they became inhabitants. An order of sessions, therefore, quashing the order of reimbursement, and the conviction founded thereupon, was confirmed. (2)

The order of maintenance and reimbursement must be made by the same justice, and at the same time.

In the foregoing case, the defendant, who was an overseer of the parish on whom the order of reimbursement was made, had been convicted in a penalty of 5l. under 34 Geo. III. c. 47. s. 3. and afterwards appealed to the next sessions against the order and conviction. One of the questions made by the sessions was, Whether an appeal could be maintained by the appellants against the order of reimbursement, notice being given thereof subsequent to the conviction? The court, by affirming their

An appeal lies against an order to reimburse, under 34 Geo. III. c. 47.

(1) Rex v. White and Ellis, Cald. 185.

(2) Rex v. Ledbury, 7 Term Rep. 552.

order

order made upon the appeal, decided that the appeal was properly brought. (1)

The parish of the principal is bound to reimburse that of the substitute, although he has more than one child when enrolled.

It seems, likewise, that the parish to which the principal militia-man belongs, is liable to reimburse that of the substitute the expence of maintaining his family, although the substitute had more than one child when enrolled (2), or had neither been approved nor enrolled, provided he is sworn in and actually serves. (3)

"One Spry, of the parish of Barnstaple, who was drawn by ballot to serve in the militia, procured one Eastman, of Monkleigh parish, to serve for him as his substitute; when Eastman appeared before the deputy-lieutenant, in order to be approved, he represented himself as a single man; it turned out in the sequel that he was married, and had several children. Eastman being approved and sworn in, went out into actual service; certain expences were incurred in maintaining his family (4): and the question is, Whether that burthen ought to be borne by Monkleigh, that has nothing to do with the principal militia-man, or by the parish of Barnstaple, for which the substitute served? It seems to me, that the construction put on the first statute 26 Geo. III. by the prosecutor's counsel, namely, that the words commented upon are merely directory, is the true one. The deputy lieutenants ought to make every inquiry before they approve of a substitute; if he have more than one child, he ought to be rejected; but if the deputy lieutenants do take him, then he becomes a legal substitute, and the parish for which the principal serves must bear the expence of maintaining his family. The tendency of the defendant's argument is, to shew that the whole is a nul-

(1) Rex v. Ledbury, 7 Term Rep. 558.

(2) Rex v. Willis. 6 Term Rep. 179.

(3) Rex v. Ledbury, supra (1).

(4) The facts were found by a special verdict.

lity;

lity: but the consequence of that must be, that a whole regiment must be disbanded, even in the face of an enemy, if it should be discovered that it is composed of substitutes, each person having more than one child. Besides, the words of the second act of parliament (1) are general; and one of the clauses mentions the word *family*. As therefore the substitute was approved and sworn in, and actually did serve in the militia, I think that the whole of the acts of parliament attached on him in that situation, and consequently, that the parish of Barnstaple, for which the principal was drawn, are liable to reimburse the other parish the expences of maintaining the family of the substitute: a contrary determination would not only be against the intention of the legislature, but productive of the most dangerous consequences to the whole body of the militia. (2)

And in Rex v. Ledbury, Lord Kenyon observes, "If the objection had only been that the substitute was not approved or enrolled, probably I should have thought (though it is not necessary to decide that point) that upon the principle of our determination, in Rex v. Willis, that provision in the statute was only directory, and that if the substitute were sworn and actually served he was entitled to all the benefits of the act." (3)

And it seems liable where the substitute is sworn and serves, although neither approved nor enrolled.

But the method of providing for the families of militia-men is altered by 43 Geo. III. c. 47. (4)

(1) 3[illegible] III. c. 8 [illegible]

(2) Per Lord Kenyon C. J. Rex v. Willis, 6 Term Rep. 179.

(3) Rex v. Ledbury, ante, 338 (3)

(4) See Appendix. Also 51 Geo. III. c. 106. and 52 Geo. III. c. 120. for enabling the wives, widows, and families of soldiers embarked for foreign service, or dying, or employed there, to return to their homes. In the Appendix.

SECT. IV.

Of maintaining casual Poor.

Parish bound to maintain casual poor, while residing there. And to reimburse a parishioner assisting them.

WHERE a poor person, not settled in a parish, becomes chargeable, from accident or sudden calamity, he falls within the description of casual poor, and the parish, in which he is detained, becomes bound to relieve and take care of him (1). This obligation is so strong, that if a parishioner, not being a parish officer, takes care of one rendered poor and impotent from sudden accident, as by the fracture of a limb, he may recover against the parish officers the sum expended for his cure and support, upon an implied promise arising from this their duty (2). But the parish cannot recover, as upon an implied promise, the sum which they have expended for his relief from the place in which he is settled (3), although they give notice to the officers of the parish where the pauper is settled pending his illness. (4)

And cannot recover what is expended from his place of settlement.

Nor from the pauper's master, although his yearly servant.

Neither have they a remedy against the master of a servant who becomes suddenly disabled by misfortune; for parishes are, under a moral as well as a legal obligation, to take care of their casual poor. (5)

(1) See Rex v. Chadderton, 2 East, 27.

(2) Per Lord Eldon, C. J. Simmons v. Wilmot, 3 Espin. Ni. Pri. Cas 92.

(3) In Watson v. Turner, Bull. N. P. 129. 147. 281.

(4) Atkins v. Banwell, 2 East, 505.

(5) Newby v. Wiltshire, Cald. 527. 2 Espin. Ni. Pri. Cas. 739. and see Wennell v. Adney, 3 Bos. and Pull. 247. and ante, 141. (6). And quære, whether they can legally, in such a case, obtain an order of removal and suspend it, as was done in Rex v. Kingstone, 1 East, 107. ante.

CHAPTER XXXV.

Of Overseers' Accounts.

SECT. I.

Of the Statutes.

[illegible]

WHEN the parish officers are retiring from office, their remaining duty is to make up and pass their accounts, and to deliver over any balance in their hands to their successors, together with the property and documents of the parish.

43 Eliz. c. 2. s. 2. Officers must account to their successors within four days, &c.

By 43 Eliz. c. 2. s. 2. The churchwardens and overseers, or such of them as shall not be prevented by sickness or other just excuse, to be allowed by two justices, shall, within four days after the end of their year, and after other overseers are nominated, make and yield up, to such two justices of peace, true and perfect accounts of all monies received by them, and such sums as have been rated and not received, and of the stock in their hands, or in those of any of the poor to work, and of all other things concerning their office; and such sums as are in their hands, shall pay to the officers newly nominated, upon pain that every one of them neglecting, shall forfeit for every such negligence 20s. By s. 4. their successors may levy, by warrant from two justices, the sum of money or stock which shall be behind on account; and in defect of distress, the justices may commit to the county gaol until payment. They may also commit such as refuse to account, there to remain without bail or mainprize, until they have accounted and satisfied,

Sec. 4. Justices may levy sums in arrear and commit to gaol in default of distress.

and

and paid so much as upon the account shall be remaining in their hands.

17 Geo. II. [illegible] account within 14 days [illegible] to their successors.

The 17 Geo. II. c. 38. § 1. requires that they shall within fourteen days after their successors are appointed deliver in to them just and perfect accounts in writing fairly entered in a book to be kept for the purpose and signed by them, of all sums of money received by them and sums rated and assessed and not received, and of all goods, chattels, stocks, and materials in their hands or in those of any of the poor in order to be wrought, and of all monies paid by them, and of all other things concerning their office. They are also to pay and deliver over all sums of money, goods, chattels, and other things as shall be in their hands, unto the succeeding overseers: and they shall verify their account by oath, or if a quaker, by affirmation, *before one* or more justices, who shall sign and attest the caption of the same at the foot of the account.

Accounts to be preserved, and inspected [illegible]

It further provides, that the accounts shall be carefully preserved by the parish officers in some public place, that persons assessed or liable to be assessed may inspect them, on paying 6d. for such inspection, and may have copies on paying 6d. for every three hundred words.

Sect. 2. Overseers [illegible] committed.

Sect. 2. enacts, that if they shall refuse or neglect to make and yield up an account verified as aforesaid, within the time limited, or to pay or deliver over such sum or sums of money, goods, chattels and other things in their hand, two or more justices may commit them to the common gaol until they do.

Sect. 3. Officers [illegible] other parish [illegible]

Sect. 3. requires an overseer, removing from the place for which he was appointed, to deliver up his accounts, and pay his balances to some churchwarden or overseer,

previous to his removal, under like penalties. It also requires, where an overseer dies, that his executor or administrator shall, within forty days, make up the accounts, and deliver over any balance.

ing their year.

50 Geo. III. c. 49.

50 Geo. III. c. 49., after reciting the provisions of 43 Eliz. c. 2., and also that in 17 Geo. II. c. 38. requiring churchwardens and overseers to deliver up their accounts, verified on oath, to their successors, within 14 days, enacts, that in all cases where such account is required to be made and yielded, signed and attested by virtue of 17 Geo. II. c. 38. it shall be submitted by the churchwardens and overseers to two or more justices of peace of the county, dwelling in or near the parish or place to which such account shall relate at a special sessions to be holden for that purpose, within the fourteen days, appointed by 17 Geo. II. for delivering such account, which justices are authorized and empowered, if they think fit, to examine into the matter of such account, and administer an oath or affirmation to such churchwardens and overseers of the truth of it, and disallow and strike out all such charges and payments as they shall deem to be unfounded, and reduce such as they deem exorbitant, specifying upon or at the foot of such account, every such charge or payment, and its amount, so far as they disallow or reduce it, and the cause for which it is so disallowed or reduced; and such two or more justices are to signify their allowance and approbation of the account in manner directed by 17 Geo. II. And in case the churchwardens and overseers, or any of them, shall refuse or neglect to make and yield up, or to submit such account, or to verify the same by oath as aforesaid, or to deliver over to their successors within 10 days from the signing and attesting such account, any goods, chattels, or other things which, in the examination and allowance of such account in manner aforesaid, shall

appear to be remaining in the hands of such churchwardens or overseers, it shall be lawful for any two justices of the peace to commit him, her, or them to the common gaol, until they shall have made and yielded such account, and verified the same as aforesaid, or shall have delivered over such goods, chattels, and other things which shall appear to be so remaining in their hands; and in case they, or any of them, shall refuse or neglect to pay their successors, within 14 days from the signing and attesting such amount, any money or arrearages which, on examination and allowance thereof, shall appear or be found due or owing from them or any of them, or remaining in their hands, it shall be lawful for the subsequent churchwardens and overseers, by warrant from two or more justices of the peace, to levy all such sums of money by distress and sale of the offender's goods, rendering to the parties the overplus, and in default of distress the justices may commit them to the county gaol, there to remain without bail or mainprize, until payment of such money or arrearages.

Sect. 2. By Sect. 2. churchwardens or overseers aggrieved by the disallowance or reduction of such charges or payments, may appeal against the order, at the next general or quarter sessions to be holden next after the tenth day from making such order, having first paid, or delivered over to their successors, such money, goods, chattels and other things, as on the face of the account by them submitted to the justices shall appear and be admitted to be due and owing from them, or in their hands, and having also entered into a recognizance before one or more justice or justices, with two sufficient securities to be approved by them, in not less than double the sum or value in dispute, to enter such appeal at such next general or quarter sessions, and abide by such order as shall at that or any subsequent sessions be made

made thereon; and the justices assembled at such sessions, on proof of the matters aforesaid and production of such recognizance and proof of the same having been duly entered into, may adjourn such appeal if they see occasion, or hear the same, and examine into and confirm or reverse such disallowance or reduction in the whole or in part, as to them shall seem just; and may also make an order, if they shall think fit, that such churchwardens and overseers shall have the costs incurred by them upon the appeal defrayed out of the poor rates, and the order of the general quarter sessions, in execution of the power given them by the act, shall be binding on all parties.

By Sect. 3. the form of appeal against the accounts by any person entitled thereto under the former acts is preserved. Sect. 3.

By Sect 4. every mayor, bailiff, or other head officer of any town and place corporate and city, or any two magistrates thereof, being justice or justices of the peace respectively, have the same powers within the limits of their several jurisdictions, as justices for the county have under the act, subject to the like privilege of appeal to the sessions of the limit, except when there are not four justices when it is to be made to those holden for the county, &c. Sect. 4.

By Sect 5. the certiorari is taken away and all orders and proceedings of sessions, as also of the justices (subject to appeal to the sessions) are made final and conclusive. Sect. 5.

By Sect. 6. the act is not to extend to the accounts of parish officers in any parish or place, who, by the provisions of any act relating thereto, are exempted from rendering the accounts required by 43 Eliz. & 17 Geo. II. nor to the city of London. Sect. 6.

By

Sect. 7. By sect. 7. no provisions or regulations of 43 Eliz. or 17 Geo. II. are altered or repealed, except so far as the same are expressly amended or altered by this act.

SECT. II.

Of the Time and Manner of making up and delivering the Accounts.

When parish enabled to call for an account and balance.

THE money is deposited in the overseers' hands for the use of the parish; but the latter has no right to call upon him for it (1), or for his accounts, until fourteen days after the expiration of his year, unless he previously quits his office by removing from the place. (2)

Accounts how to be kept and balanced.

The 17 Geo. II. c. 38. s. 1. directs that the accounts shall be fairly entered in writing in a book, and signed by them, of all monies received, and sums assessed and not received, and also of the parish stock. They are entitled to take credit for such money as they have properly expended in the execution of their duty, but not for sums disbursed for purposes to which the rate is by law inapplicable (3); and they are to be allowed only for their bare expences. (4)

9 Geo. I. c. 7. s. 2.

By 9 Geo. I. c. 7. s. 2. they must not bring to account monies given to poor persons not registered in the parish

(1) Rex v. Egginton, 1 Term Rep. 369. See also Rex v. Gibson, post. 348. (2).

(2) 17 Geo. II. c. 38. s. 3. directs the accounts to be delivered in that case, previous to his removal.

(3) Bott 360. (3)

(4) Per Ashton, J. Rex v. Ashburn-

books,

books, except it be done on sudden and emergent occasions, upon pain of forfeiting 5l.

If they continue in office more years than one, they must settle their accounts at the close of each year. They cannot include the charges of several years in one account, but all the items of the accounts should be confined to that year, when the accounts are directed by the act to be passed; otherwise, as the inhabitants of the parish are a fluctuating body, the present inhabitants would be burdened with the expences of their predecessors. (1) Those who continue successive years in office should settle the accounts of each year distinctly.

SECT. III.

Of the Justices' Jurisdiction as to the making up, Delivery, and allowance of Accounts, and a Neglect thereof.

By 43 Eliz. the account is to be given to two justices, and not to the succeeding overseers. (2) Of the justices' power to audit accounts, under 43 Eliz. c. 2.

The parish officers might, within the four days allowed them by 43 Eliz. c. 2. submit their accounts to any magistrates of their own chusing, within which time they could not be summoned before any justices: but when once laid before particular justices, either by the overseers themselves, or by the parish, after these four days, no other justices could meddle with them; and if they did, any allowance or disallowance by such justices was void. (3)

(1) Rex v. Goodchehp, 6 Term Rep. 159.

(2) Anon. 2 Salk. 525.

(3) Rex v. Townsend, 1 Bott, 305. Pl. 313. post. 366 (1).

The

The justice's authority in stating overseers' accounts could not be delegated to any other. (1)

Cannot commit not bringing in account. Upon that statute they cannot commit an overseer, for not bringing in an account until after the year is expired (2), nor for bringing in one to which they object; for they ought to hear it, strike out what is amiss, and balance the account (3). So, if he tendered an ac-

Nor when he has rendered an account in gross. count in gross of receipts and payments, and refused to deliver in a particular account, or produce his books, by which he received the monies on rates assessed, &c. and also a particular account to whom he had paid such money charged in gross, they had no authority under this act to commit for refusing to give an account, for it appears that an account had been tendered. (4)

May fine as well as imprison for refusing to account. It was resolved that justices might fine overseers, as well as imprison them, for refusing to account. (5)

Form of the commitment for not accounting. The commitment should state the party to be overseer. It is said to have been determined, therefore, that where a churchwarden was committed for refusing to account, he was discharged upon an *habeas corpus*, "for if he be committed as overseer, it must be so expressed in the mittimus, although the office of overseer is annexed to the office of churchwarden, for the justices have no power over him as churchwarden." (6)

That he had not accounted before another justice. It should likewise aver, that he has not accounted before any other justice: if the order only says, that he has

(1) Rex v. Turner, 16 Vin. Abr. 415. Rex v. Townsend, 1 Const. Pl. 341.
(2) Rex v. Gibson, Fol. 2..
(3) Rex v. King, ... Whi... 1 Const. Pl. 3...
(4) Rex v. Carmike, Show. 39.
(5) Rex v. Sedgewell, 1 Bott, Pl. 307.
(6) Rex v. Pe... 1 Barb. 74.

not accounted before the justices who make it, that is insufficient (1). The warrant must conclude, "There to remain until they shall account," and not, "*until they be duly discharged according to law.*" For there is a difference whether a man is committed as a criminal, or for contumacy in refusing to do a thing required. In the first case, the commitment must be, "until discharged according to law;" but in the latter, "until he comply and do the thing required of him;" for in that case he should not lie till the sessions, but shall be discharged on performing his duty. (2) Conclusion of the warrant.

It appears from the foregoing cases, and also from some which will be detailed hereafter, that many imperfections existed in the manner in which parish officers were directed to pass their accounts by 43 Eliz. To remedy these defects, together with others in the same act, the 17 Geo. II. c. 38. was passed. Provisions of 17 Geo. II.

[redacted]eers are required, [redacted] pi[redacted] to [redacted] account in [redacted] fairly entered [redacted]ceipts and expenditures, &c.—Whereas they c[redacted] be compelled to give in a particular account in items under 43 Eliz. (3) 2. They are to deliver these accounts to the succeeding overseers, who are required to keep them safely; whereas under 43 Eliz. they must be given to the justices, who were to allow them (4). 3. As a further

(1) Rex v. Gibson, ante, 348. (2). But this seems unnecessary when the commitment is under 50 Geo. III.

[redacted]hurch-wardens of Northampton, Carth. 151. ante, 183. n. (4). 260. n. (7).

(3) Rex v. Carrocke, ante, 348. n. (4).

(4) Ante, 347. (2). 348. (1).

farther security to the parish, the accounts are to be verified by the oaths of the parties, which the 43 Eliz. did not require. The oath may be taken before one magistrate, and if any parish officer neglects or refuses to take it, or to make and yield up such account verified as aforesaid, two justices may commit him or them to gaol until they do. 4. They are allowed 14 days after they go out of office to pay and deliver over to their successors the money and other property of the parish remaining in their hands. Whereas the 43 Eliz. seemed to require that it should be done within four days, or at least as soon as their accounts were allowed. 5. When they don't deliver in their account, and pay over the money, &c. as required by 17 Geo. II. two justices may immediately commit such as refuse, until they do. But under 43 Eliz. they could not be committed in the first instance, nor until a warrant had issued to distrain upon them. (1)

Examination and allowance under 43 Eliz.

The powers given by 43 Eliz. c. 3. seem unaltered in any other material respect by this act. Therefore the right of examining the disbursements by two justices, and allowing the accounts, pursuant to that statute, still continues, where the parish had reason to suspect their accuracy, and chose to proceed upon it. (2)

Remedy for refusing to account under 17 Geo. II. c. 38.

When an officer refused or neglected to make up and verify his account, under 17 Geo. II. c. 38. two justices might upon complaint, commit him to gaol (3). But they could not refuse to swear him before he had ac-

(1) See post. 353. (4). See also Rex v. Hedges, 2 Salk. 533 ibid. the opinion of Yates, J. Rex v. Justices of Berkshire, 1 Bott, 309. Pl. 322

(2) See Rex v. Whitear, et al. 5 Burr. 1365. post. 365. (2). and see

(3) Sect. 2[illegible]

counted, according to 43 Eliz. c. 2. If an overseer therefore delivered an account, and was ready to swear to the truth of it, and one or more justices refused to admit his oath, the court of king's bench, upon affidavit of the fact, would grant a mandamus to compel them.

Must swear him to the account he tenders.

On such a motion for a mandamus, the justices shewed, for cause against it, that when the overseer delivered in his account, it consisted of gross sums; and that the justices asked him some questions touching the particulars, which he refused to answer: and therefore they refused to swear him to his account. Wright J.—This court hath two jurisdictions over justices of peace: 1st, To punish and restrain them, when they exercise a jurisdiction which they have not. 2. To compel them by mandamus, when they refuse to do what they by law ought to do. This motion is founded on the statute 17 Geo. II. c. 38. which requires the justices to do a thing which they have refused to do. If the justices apprehend that this statute has not repealed the statute 43 Eliz. as to overseers' accounts, they may return that matter upon the mandamus, and then they will have the judgment of the court, whether they are obliged to swear this overseer, before he has accounted according to the statute 43 Eliz. c. 2.; but we cannot refuse to grant the mandamus, for it is a motion of course. Dennison and Foster, Js. of the same opinion, that it was a motion of course. (1)

Or the court will grant a mandamus.

But now by 50 Geo. III. c. 49. sect. 1. their accounts are to be submitted by the churchwardens and overseers, to two or more justices dwelling near the place to which they relate, at a special sessions to be holden for

50 Geo. III. c. 49. s. 1.

(1) Rex v. Justices of Middlesex, 1 Wils. 125.

the purpose within the fourteen days appointed by 17 Geo. II. for delivering them.

The justices may examine into the matter of the account, and administer an oath or affirmation of the truth of it, and strike out such charges as they deem unfounded, and reduce such as are exorbitant, specifying on or at the foot of the account every such charge and payment, and the amount so far as the court disallow, and reduce the same.

Such two or more justices are likewise required to signify their allowance and approbation of the account under their hands, "and sign and attest the caption of "the same at the foot of such account," as directed by 17 Geo. II.

If the churchwardens and overseers, or any of them, refuse or neglect to make and yield up or submit such account, or verify the same on oath as aforesaid, any two or more justices may commit him, her, or them, to the common gaol, until he, she, or they, have made and yielded such account, and verified the same.

Mandamus to oblige justices to pass accounts. A mandamus is the only remedy where the justices refuse or make any unreasonable delay in passing overseers' accounts, after they have been submitted to them. (1)

SECT. IV.

Of enforcing Payment of the Balance due from Overseers.

1st, By order [illegible] under 43 Eliz. WHEN the balance of an account was found against [illegible] officers [illegible] who took the account under [illegible]

(1) [illegible] Kenn. [illegible] 1 Bott, [illegible] 17.

43 Eliz.

43 Eliz. had power to make an order for them to pay the balance, as well as to issue warrants to distrain. (1)

They might likewise make a joint order upon all the officers to pay; for all constitute but one joint officer; and payment to one is payment to all, and the payment by one a discharge of all (2). And although the 43 Eliz. directs, that the balance shall be paid to the succeeding overseers, yet if it has not been paid to them, the order may direct it to be paid to those who are overseers at the time when such order is made. (3)

It may be a joint order on all the officers.

Payment to the overseers at the time of making the order, good.

If overseers refused to pay the balance, they could not be committed immediately, but a warrant must issue to distrain upon them, and upon the return thereof, there may be a commitment; and so it was determined in Walrond's case before Lord C. J. King. (4)

Warrant of distress must issue prior to a commitment.

The 17 Geo. II. c. 38. s. 2. gave any two or more justices a power, upon the overseer's neglect or refusal to pay and deliver over such money, goods, or other things in their hands, as by that act is directed (*i. e.* within fourteen days after the nomination of new overseers), to commit them to the common goal, until they shall have given an account, *and yielded up* such monies, &c. as are in their hands. (5)

Power to commit under 17 Geo. II. until they yield up the balance.

But it is now provided by 50 Geo. III. c. 49. s. 1. that if the churchwardens and overseers, or any of them,

50 Geo. III. c. 49. s. 1.

(1) Rex v. Topham, 2 Salk. 484.

(2) Rex v. Bartlett, 1 Bott, 306. Pl. 320. An order made at sessions.

(3) Ib.

(4) Rex v. Turner, 16 Vin. Abr. 418. See also Rex v. Hedges, 2 Salk. 533. An order made at sessions upon appeal against an allowance by two justices.

(5) But quære, whether this power extends beyond the balance, &c. admitted to be in their hands, by their own accounts, as verified by oath or affirmation?

refuse

refuse or neglect to deliver over to their successors, within ten days from the signing or attesting their accounts, any goods, chattels, or other things, which, on the examination and allowance thereof, shall appear remaining in their hands, any two or more justices may commit him, her, or them, to the common gaol, until they shall have delivered them over. And in case they, or any of them, shall refuse or neglect to pay their successors, within 14 days from signing and attesting the account, any money or arrearages, which, on examination and allowance thereof, shall appear due and owing from them, or any of them, or remaining in their hands, the subsequent officers may, by warrant from any two or more justices, levy the same by distress and sale of the offender's goods, restoring the overplus; and in default of such distress, the justices may commit the offender or offenders to the county gaol, to remain, without bail or mainprize, until payment.

2d, By indictment for not accounting, &c.

A further remedy for neglecting to pay over such balance is by indictment, which lies for this offence (1), as also for refusal to account within the time limited by statute (2), or for making a fraudulent charge in the account. (3)

3d. When overseer becomes bankrupt before expiration of his year.

If an overseer become bankrupt whilst in office, and at the end of his year a balance is found due from him to the parish, he may be committed for not paying it, although the sums from whence it accrued were received previous to his bankruptcy. For the parishioners had

(1) Rex v. King, 20 Geo. II. 2 Str. 1268.

(2) Although the statute provides another remedy by commitment. Rex v. Commings, et al. 7 W. III. 5 Mod. 179. 1 Bott, 342, Pl. 372. Rex v. King, 2 Str. 1268. See Rex v. Robinson, ante, 234. (4).

(3) Per Eyre, J. Moulsworth's case. Comb. 287.

no cause of action against him before his bankruptcy; at that time they could not have sued him for his debt, for he had a right to retain the money until fourteen days after the expiration of his office. His bankruptcy did not discharge him from his office of overseer; and if this sum had been kept by itself, the bankrupt's assignees could not have touched it: he was a mere trustee for the parish. (1)

But in a subsequent case before Lord Eldon, chancellor. The object of a petition was to prove, under a commission of bankruptcy against one of the overseers of the poor, in respect of money in his hands at the time of his bankruptcy. The case of the King *v.* Egginton was mentioned as unsatisfactory; for though there could be no action, still there might be a good equitable debt, which might be proved. The Lord Chancellor disapproved that case; observing, it was very dangerous to hold, that because the time of accounting had not arrived, in case of the bankruptcy of the trustee, there was not such an assumpsit as would enable the parish to prove. (2)

If an overseer becomes bankrupt subsequent to the expiration of his year, and before payment of any balance due from him, the parish may prove the amount under

4th, If bankrupt after its expiration.

(1) Rex *v.* Egginton, 1 Term Rep. 369. These and the subsequent determinations were decided prior to 50 Geo. III. c. 49. but they seem equally applicable to cases under this statute.

(2) His Lordship said, if there was no opposition, the order should be made. Ex parte, Eyleigh 6 Ves. Jun. 811. and quære whether 49 Geo. III. c. 121. sect. 9. has any operation on cases of an overseer's bankruptcy during his continuance in office? It provides, "that all and every person or persons who have or shall give credit to any person or persons who become bankrupts, upon good and valuable consideration *bonâ fide*, for any money whatsoever, which is or shall not be due or payable at or before the time of such persons becoming bankrupt, shall be entitled to, and receive proportional dividends of the bankrupt's estate equally with his or their other creditors, deducting only a rebate of interest for what they receive at the rate of five per cent.

his commission. And where the object of an overseer's commitment is only to enforce payment, he seems protected from such imprisonment, because the bankrupt laws exempt him from arrest by any process used to compel the discharge of a debt. (1)

Mandamus where justices refuse to enforce payment of the balance.

If justices decline to receive and proceed upon a complaint against an overseer, for refusing to pay over the balance in his hands, the court of king's bench will grant a mandamus to compel them. (2)

Return of a consent by vestry, that the overseers should keep a balance, for purposes not authorized by 43 Eliz. c. 2. is insufficient.

Mandamus to the justices to grant a warrant for levying thirty pounds, being the balance of the account of the last overseers in their hands. They returned, that there was such a balance, but that the vestry had ordered them (*i. e.* the overseers) to retain it, and employ an attorney to sue for some charity money, and get it laid out for the benefit of the poor; that one G. was so employed, and the balance exhausted in fees, and that the overseers had engaged to pay G.; *et eâ de causa*, they had refused to

(1) The petitioner absconded, to avoid paying money, reported to be in his hands as assignee, under a commission of bankruptcy, and which under an award made, and rule of court, he was ordered to pay. Upon that act of bankruptcy a commission issued against him. He surrendered under the commission; and as he was going out of Guildhall from his examination, he was arrested under an attachment for the contempt. The petitioner prayed that he might be discharged from custody, under 5 Geo. II, c. 30. s. 5. The chancellor thought this merely an attachment to enforce the payment of money, and discharged the bankrupt. Ex parte Parker. 3 Ves. Jun. 554. So where one was in custody for non-payment of costs, taxed in pursuance of a recognizance, entered into by him, on his removal of an indictment from quarter sessions, under 5 & 6 W. III. c. 11. s. 3. B. R. held, that he might be discharged under the lords' act, for, although a criminal proceeding in form, it is in substance of a civil nature, and an execution for a debt to the party. Rex *v.* Stokes Cowp. 136. But quære, whether the justices have not power to commit, for refusing to deliver in and verify an account?

(2) See Rex *v.* Carter, 4 Term Rep. 446. post. 367.

grant the warrant. *Per Curiam.* There must go a peremptory mandamus; for the 43 Eliz. c. 2. s. 2. says, the balance shall be paid over to the new overseers, under a penalty, and it is not in the power of the vestry to dispense with the statute. (1)

SECT. V.

Of Money due to Parish Officers during the Continuance or at the Expiration of their Office.

It has been already seen, that if a balance is in the overseers' favour, their successors cannot repay them (2) except in cases provided for by 17 Geo. II. c. 38. and by 41 Geo. III. c. 23. s. 9. (3)

Balance due to old overseers, recoverable only under 17 Geo. II. c. 38. and 41 Geo. III. c. 23.

In a case prior to these statutes, where it appeared that an overseer had omitted to take credit in his account for a sum of money justly expended by him, it was held, that the sessions had no authority, upon appeal, to order his successors to pay the money to his executor, although the vestry consented (4); for otherwise, a man who came into the parish after the overseer's year, would be charged to the expence of that preceding year, while he had been contributing to the maintenance of other poor in another parish. (5)

Error against an overseer in his accounts, not to be rectified by sessions after settlement, though with the vestry's consent.

(1) Rex *v.* Justices of Somersetshire, 2 Str. 992. Cunn. 105. S. C. As to the sessions' power to order payment of the balance, see post. 367.

(2) See Tawney's case, 2 Ld. Raym. 1011. Rex *v.* Overseers of St. Peter's the Great, Chichester, Fol. 33. But see the order as recited. 1 Const. 310. Pl. 351. and ante, Vol. i. 64. et seq.

(3) Ante, Vol. i. 63. et seq.

(4) Reg. *v.* Ware, 1 Bott, 314. Pl. 328.

(5) S. C. Fol. 10. 1 Bott, 314. n. (a). Rex *v.* Goodcheap, ante, 347. (1).

But he might be reimbursed from balance in his co-officer's hand, or if paid to his successor.

But where one overseer is money out of pocket, and one of his co-officers has received a sufficiency to reimburse him, an order may be made upon such officer. (1)

When overseers of districts within a parish are to receive from each other

There are four adjacent towns within the parish of Banbury, and there is an overseer within each town, and an overseer also within the borough; they all join in one account, and there is but one rate made for all the parish, but the overseers of each particular town collect and pay the money within such town. A person, who is tenant of lands in one of these towns, lives in the borough, and is assessed by the overseer of the borough for lands within the town, and paid to the overseer of the borough, and the like is done in the other towns; so that the overseer of the borough had a surplusage for the poor within the borough, and the overseers of the towns wanted money for the poor within the towns, though the poor within the towns were less than the poor within the borough. And upon this, the justice ordered that there should be distribution made; and this order, being removed, was confirmed, this being held not within the statute 13 & 14 Car. II. c. 12. (2)

SECT. VI.

Of compelling the Delivery of Books and other parochial Documents.

Mandamus to compel delivery of

THE books of the poor rates (and other public books and papers belonging to the parish) (3), ought to be

(1) Semb. Rex v. Limehouse, 1 Geo. I. Fol 22.

(2) Case of the borough of Banbury, Skin 258.

(3) Rex v. Blatshow, 1 Bott, 300. Pl. 306.

kept

kept so as all the parishioners may have access to them; and the overseers and churchwardens for the time being ought to have the custody thereof. Where, therefore, the old overseers refused to deliver them over to the new, the court may grant a writ of mandamus to compel them. (1) parish books, &c.

By 50 Geo. III. c. 49. s. 1. If they or any of them refuse or neglect to deliver over to their successors within ten days from the signing and attesting their accounts, which on the examination and allowance of their account (under that act) shall appear to be remaining in their hands, any two or more justices may commit him, her, or them to the common gaol until they shall have delivered over such goods, chattels, and other things.

SECT. VII.

Of appealing against Overseers' Accounts.

Succeeding overseers, and all aggrieved, may appeal.

If the succeeding overseers are dissatisfied with the account given by their predecessors, and allowed by the magistrates, they may appeal on behalf of the parish to the quarter sessions. The same remedy is given to all other persons having objections to their accounts, or finding themselves aggrieved by any neglect, or thing done, or omitted, by the churchwardens, overseers, and justices. (2)

(1) Ib. Rex *v.* Clapham, 1 Wils. 305.

(2) Originally by 43 Eliz. c. 2. s. 4. afterwards by 17 Geo. II. c. 38. sect. 4. The power of appealing against a poor rate, being given by the same clauses, as allow it against overseers' accounts, the subject will be explained more minutely, in treating of appeals against rates, &c. The 41 Geo. III. c. 23. s. 4. likewise requires that there shall be a similar notice of appeal in this case, as in appeals against rates for the poor's relief, for which, see also post. chap. .vii.

No time limited for appealing, by 43 Eliz. How far limited to the next sessions, after allowance by 17 Geo. II.

The 43 Eliz. imposed no limitation as to the time of appealing; it was held, therefore, that, under that statute, the parish might appeal against accounts several years after they had been allowed and confirmed (1). And it seems the better received opinion that the 17 Geo. II. has made no alteration in this respect, where the party appeals against the allowance of overseers' accounts, and an order to pay over his balance (2), or such other acts as are required to be done by virtue of 43 Eliz. (3)

When

(1) Rex *v.* Bowen, Sett. Poor, 111. Rex *v.* Bartlet, post. 365. (1).

(2) Rex *v.* Whitear and others, 3 Burr. 1365. post. 367. (2).

(3) This was decided in the following case:

Rule to shew cause, why *an order of sessions dismissing six appeals* to overseers' accounts, on the ground of not being made within due time, (being after the next session), whereas, by 43 Eliz. no time is specified; should not be quashed.

Another objection to the order of sessions was, that one of the churchwardens, whose accounts were appealed against, sat as a justice and judge when the question was brought on at the sessions.

Mr. Dunning and Mr. Kenyon, in support of the rule contended that, by stat. Eliz. the appeal need not be to the next sessions. That it did not appear that the proceedings were on 17 Geo. II. which limits the appeal to the next sessions; consequently, that the appeals were improperly dismissed: that the 17 Geo. II. could not be considered as repealing the stat. of Eliz. that it would be dangerous to leave it in the power of the officers whose accounts were impeached, to limit the time of appeal by going before one justice.

That no man can be a judge in his own case, as appears by a case in Salk. page, 607. Hard. 503.

Mr. Wallace and Mr. Bearcroft, on the other side, insisted that 17 Geo. II. and 43 Eliz. be in pari materia, must be taken as one act, and that stat. of Geo. II. had limited the time of appeal, which the stat. of Eliz. had left open. That 17 Geo. II. was made to supply the defects of the act of Eliz. one of which was the not limiting the time of appeal. That it did not appear that one of the churchwardens did act as judge.

Lord Mansfield.—The churchwarden's acting as judge vitiates the whole.

Mr. J. Aston.—In the King and Sunninghill the court gave no opinion whether the time of appeal to overseers' accounts is the same by stat. Eliz. and 17 Geo. II. but they inclined to think that, being *in pari materia*, it was confined by 17 Geo. II. to the next sessions. I give no opinion about it. The case must be sent back to be restated, particularly with respect to the manner of proceeding on the several appeals.

Mr.

When overseers' accounts were verified and allowed 8th July, being the last day permitted by the practice of

Mr. J. Willes and Ashhurst said nothing, as the case was determined on the ground of the churchwarden's acting as judge in his own case. But Mr. J. Aston expressed very strongly the inclination of his opinion, that the appeal was confined to the next sessions, and that 17 Geo. II. had in that respect altered the 43 Eliz.

This case came on again in Easter Term 1775.

Copy of the amended return to the *certiorari* :—

The general quarter sessions held pursuant to adjournment, &c. before John Beedon, Esq. &c. 14th June 1773. Also at this sessions, the six several appeals of the Earl of Ashburnham, against the accounts of the overseers of Pevensey aforesaid, for the six years preceding the last, viz. from Easter 1766 to 1772, and lodged at the last general quarter sessions of the peace holden for the said town and liberty, *were ordered to be dismissed*, as coming too late, and the same are by this court dismissed accordingly.

The said J. Beedon, Esq. the bailiff was overseer of Pevensey, from Easter 1767 to 1768. The account made up at Easter 1767 was allowed 30th April 1767 by *two* justices, being first verified on oath of one of the overseers.

The account made up at Easter 1768 was allowed 15th April 1768 by *two* justices, and verified upon oath.

From Easter 1768 to the present time, Beedon has always been one of the churchwardens of said parish.

The account of Easter 1769 was allowed 6th April 1769 by two justices, and verified as aforesaid.

The account of Easter 1770 was allowed 26th June by two justices and verified.

The account of Easter 1771 allowed 12th April, 1771, &c. Do. of Easter 1772 allowed on 29th April 1772, &c. Do. of Easter 1773 allowed 23d of April 1773, &c.

During all these years Beedon and one of the allowing justices were rated to Pevensey.

General quarter sessions 16th July 1773, before John Beedon, Esq. &c. on the appeal of the Rt. Hon. Earl of Ashburnham, against the accounts of J. Reppington and Mr. Man, the late overseers of said parish, lodged at the last general quarter sessions, and respited to this, It is ordered, that the said account be confirmed, and the same is by this court confirmed accordingly.

Also on the appeal of the said Earl of Ashburnham against the last rate or assessment made for said parish of Pevensey, it is ordered that the same be amended as follows: That John Beedon be taxed for his dwelling-house at 4l. a-year instead of 3l. That Eliz. Jarrett be taxed at 4l. for her dwelling-house instead of 1l.; and that the said rate be with such amendments confirmed, and the same is confirmed accordingly.

of the sessions for giving notice of appeal to the next ensuing sessions, holden in July, B. an inhabitant appealed

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At this sessions previous to the determinations of the said appeals, the attorney for the appellant moved, whether, as Beedon the bailiff was one of the churchwardens, and therefore, as pretended a party, and there being no deputy bailiff, this court had jurisdiction to determine the same. The bailiff and jurats were unanimously of opinion they had.

In the account from Easter 1772 to 1773, it appeared to the court on the hearing of the appeal against it, that the overseers had charged 8l. 18s. 4d. for their own and their companions eating and drinking at an inn.

No order of any justice was obtained for any of the disbursements therein charged. No proof was made of many sums charged, though insisted on. In said account was charged a bill as paid to Beedon, which was not at hearing the appeal paid.

The account contained the following articles:

Paid for making and collecting the book. 15s.

Paid for making a book 5s.

Transcribing do. in the great book 5s.

A sum of 15s. was charged as aforesaid, for rent of a tenement for one Geare, who was not a pauper, and it appeared, at the time of determining the appeal, that neither that sum nor the sums of 6l. 10s. and 1l. 10s. were then paid. A sum of 50l. borrowed by former overseers, on their notes in 1769 and 1771, were charged. Proof was made before the court proceeded to dismiss the appeals against the six first years' accounts, on the ground of their coming too late, that the notices of appeal were couched in general terms, and did not import that the appeals were brought or to be proceeded on under 17 Geo. II.

The said John Beedon withdrew, and did not sit at the determination of the said appeal.

Mr. Dunning and Mr. Kenyon, in support of the rule, insisted, that as to six orders, they ought to be quashed, because they rejected the appeals; and the 7th, because they determined for the rate when they ought to have quashed it.

That the notice of appeal being general, the appellant might proceed either under the stat. Eliz. or Geo. II. The stat. Eliz. does not confine the appeal to the next sessions, and therefore the justices did wrong in refusing to receive the appeals.

That Mr. Beedon was a justice and party, and although it is stated that he withdrew at the time of the decision yet that was not conclusive, because by the stile of the court, it appears that he was present, which he ought not to have been.

If the court thinks, however, the state of the case is to be relied on contrary to the stile of the court, an information must be moved for, for procuring a falsehood to be stated.

The justices have stated upon the appeal which was heard, (viz. the 7th), sufficient

pealed to the subsequent sessions holden in October, when his appeal was dismissed on the ground that B. ought to

sufficient grounds to destroy their decision; for they allowed a large sum for eating and drinking, for rent for a man not a pauper, and 50l. for reimbursing people who had been out of office a great while, which they can't do, the parish being a fluctuating body, it would be hard to make one set of parishioners pay debts contracted by another set.

Mr. Wallace and Mr. Bearcroft, on the other side.—The court gave no opinion in the King *v.* Justices of Berks, whether an appeal under the stat. of Eliz. could be commenced after the next sessions, but Mr. Bearcroft admitted the practice to be, that appeals under that stat. may be after the next session.

The court at first doubted whether the stat. of Eliz. and 17 Geo. II. being *in pari materia*, were not to be considered as one stat. and whether 17 Geo. II. had not confined the appeal to the next sessions, and introduced a new regulation; and Mr. J. Aston thought it would be most convenient so to limit the appeal; upon which Mr. Dunning said, he did not contend but that the sessions might, upon hearing the merits, say, the appeal ought to be brought at the next sessions, and on that account particular circumstances might decide against the appellant, but they had no right to refuse to receive the appeal, without hearing any thing of it, merely because of its not being in time

Lord Mansfield.—*It is clear the appeal may be at any time under the stat. of Eliz. The court ought not to countenance charges for eating and drinking;* and therefore thought the order of sessions should be quashed; but declared that the objection to Beedon was overcome by the state of the case. He observed that the universal practice under stat. Eliz. not to limit an appeal to the next sessions, was exceedingly material in deciding that question.

The sessions have done wrong in not receiving the appeal, as the stat. Eliz. prescribes no time.

Mr. J. Aston.—*The churchwardens and overseers are to be allowed only for their bare expences.* The court did not in the case of the Justices of Berks give their opinion, whether under stat. Eliz. the appeal is not tied up to the next sessions, but I see by another note, of a case before that, the court said there was no limitation to an appeal under that stat. and I think there is not, though there may be great inconvenience in trying appeals at a great distance of time.

Mr. J. Willes and Ashhurst agreeing.

Rule was made absolute. (1)

(1) The King *v.* The Earl of Ashburnham and others, East. Term 1774. This note was taken by Mr. Serjeant Kirby, and communicated to me by my friend James Burrough, Esq.

have

have appealed to those held in July. Upon a mandamus to compel the justices to hear this appeal as being improperly dismissed, the court, after taking time to look into Rex *v.* Ashburnham (1) were of opinion that in every view of the case the mandamus should go, whether it be a proceeding under 43 of Eliz. or 17 Geo. II. For supposing it to be under stat. 17 Geo. II. and supposing that statute in this respect to have repealed the statute 43 Eliz. (which from the cases cited seems by no means settled), still under the circumstances, the July sessions could not be considered the next sessions for the purpose of appealing. For the allowance was on the 8th of July the last day when any effectual notice of appeal could be given, and it did not appear when B. had any notice of such allowance, and the transaction seems to carry with it the marks of design to defeat the appeal. (2)

Where a justice had committed an overseer for not accounting according to the directions of 17 Geo. II. c. 38. and his accounts were afterwards allowed by another magistrate, the justice by whom he was committed was not permitted to apply to the court of King's Bench for a mandamus to the justices at a sessions, subsequent to the allowance commanding them to hear an appeal lodged before the commitment as being brought under 43 Eliz. (3)

(1) Supra, 363. (1).

(2) Rex *v.* Justices of Dorsetshire, 15 East, 200.

(3) Rex *v.* Justices of Berkshire, 1 Const. 308. Pl. 345. The appeal was brought by the then overseer for himself and the rest of the parish. The question as stated in the report was, "whether an appeal from an overseer's accounts, verified and allowed according to the directions of the 17 Geo. II. c. 38. must be to the next sessions after the allowance, or may be to any subsequent sessions." The rule for the mandamus was discharged, on the ground stated in the text. But Yates, J. observed, "I am very clear that the appeal should have been to the next sessions." But see Rex *v.* Lord Ashburnham, ante, 363, (1). [redacted] The

The overseer's accounts must be examined and allowed by two justices, before an appeal against them can be made to the quarter sessions (1), the 17 Geo. II. c. 38. s. 4. having made no alteration in the statute of Eliz. in this respect (2). As such a previous application is necessary to give the sessions jurisdiction, it should appear on the face of their order made on the subject. (3)

Appeal must be against the justices' allowance.

It was adjudged under 43 Eliz. c. 2. that upon an appeal from the allowance of overseers' accounts, the justices at sessions, if they see reason, may disallow them, and order the overseers to pay a certain sum over, which they judge to be in their hands. (4)

Under 43 Eliz. may find a different balance due, and order the overseer to pay it.

The defendants having been overseers of the parish of Ash, laid their accounts before two justices of the peace; but before the said two justices had either allowed or disallowed the accounts, or had in any manner proceeded to examine them, the defendants laid them before two other justices, who immediately allowed them. On an appeal against these accounts, the sessions ordered the defendants to account before the two first justices. On a motion to quash the order, it was contended that the ses-

The two justices first referred to have exclusive jurisdiction of allowing and examining the accounts.

If they are allowed by others, the sessions on

(1) Rex *v.* Bartlett, 7 Geo. II. 1 Bott. 306. Pl. 320. 2 Str. 983.

(2) Rex *v.* Whitear, 3 Burr. 1365. 1 Black. Rep. 395.

(3) Rex *v.* Bartlett, ante, (1). where all that appeared by the order of sessions was, that it was "an appeal from the disbursements and from the allowance thereof." The Court held that the single word "allowance," did not sufficiently shew that the accounts had been originally before two justices, for it might be an allowance by the parish, and did not *necessarily* import the allowance of two justices; and the order was quashed.

(4) Rex *v.* Hedges, 2 Salk. 533. An overseer charged the parish with 3l. for putting out an apprentice, and his accounts were allowed by two justices; but in fact the apprentice never was put out. Upon complaint to the sessions, they ordered that the late overseer should repay the money, so fraudulently obtained, with costs, &c. Eyre, J. This order cannot be maintained, the sessions have no jurisdiction, but there may be another remedy by indictment. Moulsworth's case, Comb. 287.

sions

appeal may remit them back to the first to be allowed.

sions have only power to determine the dispute finally, so that if the allowance of these accounts had not been good, they should either have set them totally aside, or have confirmed so much of them as were good, and set aside the rest: but that here they had only referred the overseers back to the two first justices, without assigning any error or fault in the allowance by the other two justices. Parker C. J.—" By 43 Eliz. c. 2. The overseers have four days after their year to apply to any justices they please to pass their accounts, and within which time they cannot be summoned before any justice; but when the accounts are once laid before any justice, either by themselves or by the parish, after these four days, no other justices can then meddle with them; and if they do, any allowance or disallowance by such justices is void." The words of 43 Eliz. c. 2. s. 4. are, " shall make such order therein as to them shall be thought convenient;" and therefore they need not finally determine the disputes; and the reason is plain, for they cannot allow the accounts themselves, and therefore it is necessary that they should remit them, with their observations, to those that had the just cognizance. They do not by this delegate any authority to such justices, but only desire them to execute their own authority, and therefore it differs from the case where the sessions refer any thing, and give an authority to the referree. This indeed they cannot do; but here the sessions could not take it out of the hands of the first justices; and if such justices make an unreasonable delay in passing their accounts, the party may apply to this court to hasten them, which is his only remedy. The order, however, was quashed, because it was stated to have been made on the hearing of Smith, one of the justices, and did not state that the parties had been heard. (1)

Sessions cannot delegate their authority.

(1) Rex v. Townsend, 1 Bott, 305. Pl. 318. S. C. 16 Vin. Abr. 417.

The quarter sessions retain the same jurisdiction since 17 Geo. II. c. 38. which they possessed under the act of Elizabeth (1); But they have no power to make an original order upon the late overseers to pay their balance, although ascertained by them, unless a previous application has been made to two justices for that purpose; for the 17 Geo. II. has made no alteration in this respect, but has quite another view. (2)

And where, upon appeal, the sessions find a balance due from an overseer, but do not proceed to direct by their order that he pay it over to the succeeding overseers, application may be made to two justices, out of sessions, to enforce payment (3). And if they refuse, the court of King's Bench will grant a mandamus to compel them to do so. For the justices have jurisdiction in this case. The effect of the appeal was the ascertaining of the quantum of the arrears, and then the statute attaches, and enables the magistrates out of sessions to enforce the payment of the balance. (4)

The appeal given to persons aggrieved against the allowance of the churchwardens and overseers' accounts under 43 Eliz. and 17 Geo. II., is expressly preserved to them by 50 Geo. III. c. 50. s. 3. (5)

But that which is given to the officer accounting, against an order making a disallowance or reduction in their accounts, by sect. 2. of that statute is subject to the following regulations: 50 Geo. III. c. [illegible]

(1) Rex v. Goodcheap, 6 Term Rep. 159. ante, 347. (1). Rex v. Whitear, ante, 360. (2).

(2) Rex v. Whitear, ante, 360. (2.

(3) See 43 Eliz. c. 2. sect. 2. and 17 Geo. II. c. 38. sect. 3.

(4) Rex v. Ca-ter, 4 Term Rep. 246.

(5) Rex v. Justices of Dorsetshire are subsequent to that act

1. It

1. It must be to the next general or quarter sessions to be holden after the tenth day from making the order. 2. The person appealing must first have paid or delivered over to the preceding officers such money, goods, chattels, and other things, as on the face of the account submitted to the justices for allowance shall appear due and owing, or in their hands. 3. He must enter such a recognizance before one or more such justice or justices, with two sufficient sureties to be approved by them, in not less than double the sum or value in dispute; to enter such appeal at such next sessions, and abide by such order as shall at that or any subsequent sessions be made on such appeal.

The sessions, on production and proof that the recognizance was duly entered into, may adjourn the appeal or hear it, and confirm or reverse such disallowance or reduction, either in the whole or in part, and may, if they think fit, order that the appellant shall have the costs incurred upon the appeal defrayed out of the poor rates.

CHAPTER XXXVI.

Of Remedies against Parish Officers for Misbehaviour.

THE modes of proceeding against parish officers for a breach or neglect of duty are, 1st, By conviction before a justice of peace, under particular statutes (1). 2d, By indictment. 3d, By information in the court of king's bench. 4th, By action. Proceedings against parish officers; And 1st, for penalties by statute.

The punishments inflicted by statute are, 1st, By 43 Eliz. c. 2. s. 2. The churchwardens and overseers are to meet at least once a month, in the parish church, upon Sunday afternoon, after divine service, to consider of all things concerning their office; and any absenting himself without lawful excuse, or being negligent in their office, or in the execution of the said orders being made, by and with the assent of the justices, or any two of them, shall forfeit for every such default of absence or negligence 20s. 43 Eliz. c. 2. 20s. penalty for not meeting once a month.

Sect. 4. gives power to levy sums due by former officers, and to commit in default of distress, as also to commit such as shall refuse to account. (2) Sect. 4. denying money &c.

By 13 & 14 Car. II. c. 11. an overseer refusing to receive a person removed by warrant of two justices from one county, city, or town corporate, to another, forfeits 5l. to the use of the poor of the parish from whence such person was removed, to be levied by distress, &c. by 13 & 14 Car. II. c. 11. 5l. penalty for refusing to receive a pauper

(1) As to the form of proceeding [illegible]victions, see *Bo*[illegible] *Convictions* before magistrates, in the [illegible] of Con[illegible] (2) Ante, 152.

warrant of any justice of the place to which such person was removed; and for want of sufficient distress, he is to commit him to gaol for forty days.

17 Geo. II. c. 5 s. 1. 5s penalty for refusing to pay for the apprehending idle and disorderly persons.

By 17 Geo. II. c. 5. s. 1. if any overseer shall refuse to pay the sum of 5s. when ordered to be paid, for apprehending idle and disorderly persons, it may be levied upon him by distress, and he shall not be allowed it in his accounts.

17 Geo. II. c. 38. penalty of 5l. for disobeying.

By 17 Geo. II. c. 38. s. 14. churchwardens and overseers, who refuse or neglect to obey and perform the directions of this act, where no penalty is before thereby provided, or who shall act contrary thereto, shall, on oath thereof before two justices, within two months after commission of the offence, forfeit not more than 5l. nor less than 40s. to be levied by distress, &c.

9 Geo. III. c. 37. penalty from 10s. to 20s. for paying poor in base money.

By 9 Geo. III. c. 37. churchwardens, &c. wilfully and knowingly making any payment, to or for the poor's use, in base or counterfeit money, or any other than lawful money of Great Britain, shall, upon conviction by one justice, either upon non-appearance, confession, or by the oath of one witness, be adjudged to forfeit not less than 10s. nor more than 20s. to be levied by distress, &c. and applied to the use of any poor person or persons of the parish, &c. in such manner as the justice who shall adjudge the forfeiture shall direct and appoint.

33 Geo. III. c. 55. penalty not exceeding 40s. for disobeying warrants and orders.

33 Geo. III. c. 55. s. 1. impowers two or more justices, at their special or petty sessions, upon complaint on oath, and after due summons, to impose a reasonable sum, not exceeding 40s., upon any constable, overseer, &c. for any neglect of duty or disobedience of any lawful warrant or order of any justice or justices; which sum, unless paid, is to be levied by distress, and applied to the

relief

relief of the poor of the parish, &c. where the offender resides; and for want of distress, he is to be committed to the house of correction, for any space of time not exceeding ten days.

It also gives the party aggrieved an appeal to the quarter sessions, upon giving ten days notice. Power of appeal.

If any churchwarden, or overseer of the poor, be convicted of the penalties inflicted by 43 Eliz. c. 2 s. 2. another must levy it (1). The penalties for not meeting in the church shall not be inflicted on the overseers of the poor of extraparochial places, because the inhabitants have no church to meet in (2); and a parochial overseer must have notice of his appointment, or he cannot be charged for neglect. (3) Parish officers must levy on each other. Penalties for not meeting in the church. Parish officers must have notice of their appointment.

Overseers may be punished for most breaches of their duty, by information or indictment, notwithstanding that a particular punishment is created by statute, and a specific method of recovering the penalty is pointed out; for their disobedience of the statute is a contempt of the

(1) Anon. 16 Vin. Abr. 415.

(2) Rex *v.* Rufford, 8 Mod. 39. ante, Vol. i. 55. But they are punishable by indictment for not meeting as often as is necessary to discharge their duty.

(3) Rex *v.* Harman, 1 Bott, 314. Pl. 378. In this case, the defendant was adjudged guilty of eleven neglects; five of which were for absenting himself from monthly meetings; four for absenting himself from other meetings, one, that his maid refused to take the rate book; and another, that he refused to take half a year's parish rate. The order was quashed. See also Rex *v.* Moorhouse, post. 374. n. (2). Quære, if it must not be alleged in these convictions, that the defendant had accepted the office? See the opinion of Chapple, J. Rex *v.* Harman, in which case one question was, whether the proceeding was an order which K. B. would take notice of, or only the justice's process, with which they never intermeddle.

 law.

law (1). One is indictable, therefore, not only for refusing to take upon himself the office of overseer (2), but also when in office for disobeying an order of justices (3), or any other misfeasance, or wilful neglect of duty.

Sessions cannot attach them.

But they cannot be attached by the justices in sessions for disobeying an order made by them, for the sessions has no power to award an attachment for a contempt in disobeying, &c. the proper method being by indictment for a misdemeanour. (4)

Indictment for not providing for the poor. For misusing them.

If an overseer, therefore, does not provide for the poor, he is indictable; and if he relieve where there is no necessity for it, that is a misdemeanour (5). So, if they misuse the poor, as by keeping and lodging several poor persons in a filthy unwholesome room, with the windows not in a sufficient state of repair to protect them against the weather (6), or exact labour from them when unable to work (7), it is indictable.

For conspiring to marry a woman to burthen another

Further, if they conspire to prevail upon a man to marry a poor woman big with child, for the purpose of throwing the expence of maintaining her, and the issue,

(1) Rex v. Commings, 5 Mod. 179. See also Rex v. Robinson, 2 Burr. 799. ante, 234. (4), and Rex v. Jones, 1 Bott, 345. Pl. 379. post. (2).

(2) Rex v. Jones, supra, (1), ante, Vol. i. 54. (4). But they must have previous notice of their appointment. Rex v. Harper, 5 Mod. 96. Fletcher v. Ingram, ib. 127. which were cases of indictment for not executing the office of constable. See also Rex v. Harman, 1 Bott, 344. Pl. 378. ante, 371. (3).

(3) Rex v. Boys, for not paying costs, Say. Rep. 143. post. and see ante, (1).

(4) Rex v. Bartlett, 1 Bott, 342. Pl. 357.

(5) Tawney's case, 16 Vin. Abr. 415.

(5) Rex v. Wetherill et al. Cald. 432., and that the paupers need not be named in the indictment. Per Buller, J. ibid.

(6) Per Lord Mansfield, C. J. Rex v. Winship and Grunwell, Cald. 76.

from

from themselves upon another parish or township, they may be indicted (1). But, perhaps, this is not punishable where the woman, settled in the defendant's parish previous to the marriage, is with child *by the man to whom* the defendants procure her to be married (2), and it is celebrated with the free will of the parties. (3)

parish. Quære, whether punishable if the woman pregnant by the man they induce her to marry.

It was held indictable where they refused to account within four days after the appointment of new overseers, under 43 Eliz. c. 2. (4); as likewise if they do not make a rate to reimburse constables, under 14 Car. II. c. 14. (5)

Refusing to account.

Also, overseers may be indicted for not receiving a pauper sent to them by the order of two justices (6), or not providing for one in obedience to an order of sessions, unless the order is illegal. (7)

Not receiving or providing for paupers.

A justice made an order upon an overseer to pay a sum of money to a surgeon, who had taken care of a pauper; the overseer refusing to pay it, was indicted; but the court quashed the indictment, the order being made

But where the justices have no jurisdiction to make an order, the officers may disobey.

(1) Rex *v.* Compton, Cald. 246. and the cases ante, Vol. i. 259. n. (7).

(2) That the court would not grant an information in such cases, see Mr. Caldecott's note (6) to Rex *v.* Compton. Cald. 247.

(3) Rex *v.* Fowler and others, Taunton Spring assizes, Cor. Buller J. 1 East, Cro. Law. 461.

(4) Rex *v.* Commings, 5 Mod. 179, ante, 372. (1); this case occurred prior to 17 Geo. II. c. 38.

(5) Rex *v.* Barlow, 2 Salk. 609. 2 Bott, 341. Fl. 371. The objection was, that the word used in the act is "may," which does not require it as a duty. But the court held the word "may" to be imperative and the same as "shall."

(6) Rex *v.* Davis, 1 Bott, 347. Fl. 380. Say. 163. S. C. But see 50 Geo. III. c. 49. sect. 1. ante, 351.

(7) Rex *v.* Winship and Gromwell, Cald. 72. If one order of maintenance be made with reference to another, both must be set forth in the indictment, or it will be bad, ibid. Rex *v.* Moorhouse, Cald. 554. and the indictment must aver service of the order upon the defendant, ib.

in a matter over which the justice had no jurisdiction. For this kind of assistance does not come within the notion of relief to the poor. (1)

Court seldom quash indictments, when the offence is serious.

When the indictment is for a serious offence, the court refuse to quash it, unless upon the clearest and plainest grounds, and will drive the party to a demurrer or motion in arrest of judgment. (2)

3. Proceeding by information in B. R.

The proceeding by information, filed in the King's Bench, is of a higher nature, and discretionary in the court to grant (3). To institute this proceeding, a motion is made for a rule to shew cause why an information should not be granted, founded upon affidavits, which must state a criminal charge. If this ground of accusation seems sufficient in law and fact to warrant an information, the person accused is called upon to answer the charge, by shewing cause why it should not be filed. This he may do by pointing out the insufficiency of the accusation, as stated by the prosecutor, or, by producing affidavits, either to deny the facts, or else to free himself from a criminal intention, in doing that which he must admit himself to have done. Counsel are usually heard on the day subsequent to that given by the rule, or as soon after as suits with the court's convenience, both against and for it; after which the court either refuse the motion or make the rule absolute, according to the justice of the case.

(1) Rex *v.* Smith. 1 Bott, 543. Pl. 376.

(2) Rex *v.* Wetherill, Cald. 432. Reg. *v.* Pardy, 1 Bott, 347. Pl. 381. Rex *v.* Moorhouse, Cald. 554.

(3) When an information is moved for, and ordered by the court, it is filed in the name of a principal officer of the court, called the King's coroner and attorney, or more usually the master of the Crown-office. But an information may likewise be filed by his Majesty's attorney-general, *ex officio*, or, when the office is vacant, by the King's solicitor-general.

But

But as this is an extraordinary remedy, the court will not suffer it to be applied to the punishment of ordinary offences. Thus, although it was usual formerly to grant informations against overseers, for procuring a pauper's marriage, with a view to burthen another parish, the court has long come to a resolution not to grant them. (1)

Granted only in extraordinary cases.
Rule not to grant it for a conspiracy to marry paupers, &c.

The court granted an information against an overseer, for that he, with others, had forcibly removed a poor woman, who was very sick and near her time, from one parish to another, to avoid the expence it might occasion to the first parish, if the child should be born there. (2)

Grant it, for removing a pauper, when sick.

They would likewise have granted an information against an overseer, for altering a rate after it had been made and allowed, by introducing a person therein for election purposes (3). But in granting or refusing informations, the court looks to the motive, and will refuse it, although the defendant has acted improperly, if he appears to have done so without a criminal intention. (4)

Or for altering a rate after allowance.
Look to defendant's motive in granting or refusing it.

An information *quo warranto* was moved against the churchwardens of a parish, who had been sworn in by mandamus, to shew by what authority they exercised that office.

Information quo warranto lies not against churchwardens.

(1) Rex *v.* Slaughter, Cald. 246. *n.* (a). Rex *v.* Compton, ibid.

(2) Rex *v.* Busby, 2 Bott, 344. Pl. 377. But this was in 5 Geo. II. and see Rex *v.* Upsdale, East. 25 Geo. III. where an application for an information in a very gross case, for marrying a man by duress to an ideot, was refused. Cald. 247. n. a.

(3) See Rex *v.* Barratt, Dougl. 449. Although done with the approbation of the allowing justice. But the rule for an information was discharged, all criminal intention being clearly negatived.

(4) Ib. The court discharged the rule; but as the defendant's conduct was irregular, though not criminal, they refused to discharge it with costs.

office. But the court denied the motion, a churchwarden not being such a public officer, against whom an information would lie; for it was not an usurpation upon the crown; and they might as well apply for an information against a constable or *overseer;* but the parties aggrieved might have their action; for his being sworn in by virtue of the mandamus would be no bar to such action, because a mandamus gives no right, but leaves the matter as it was before. (1)

4. Actions against overseers.

An action may be maintained against overseers for money lent them to support the poor, or for necessaries and assistance found for the poor; and this upon an express (2), or an implied promise. (3)

But where a pauper certificated by G. was removed by a common order of removal from M. whither the overseer of M. delivered the pauper to the overseer of G. who received him and paid 8*l.* 9*s.* 4*d.* demanded from him by the former for maintenance of the pauper during the preceding 4 years, it was held that the latter could not recover it back from the overseer of M. in an action for money had and received. For even if the certificate is informal in not being directed to M. by name, it is evidence that G. has acknowledged the pauper as their parishioner, and it is allowed that he has been maintained four years by M., admitting therefore that the money could not have been demanded by the defendant, (which it was unnecessary to decide) yet being an honest

(1) Rex *v.* Daubney, 1 Bott, 301. Pl. 361. see ante, Vol. I. 37.

(2) How *v.* Keech, 1 Bott, 347. Pl. 382. Rex *v.* Woodsterton 2 Barnard. K. B. 207. 340.

(3) Simmons *v.* Wilmot, 3 Espin. Ni. Pri. Cas. 92. See the opinion of Buller, J. Rex *v.* Micklefield, Cald. 510. and ante, 349.

debt,

debt, and the plaintiff having once paid it, shall not by this, which is an equitable action, recover it back again. (1)

Actions most frequently brought against overseers are for things done, either without, or in violation of, their authority.

SECT. II.

Protection of Parish Officers in the Discharge of their Duty.

As a party aggrieved by the misconduct of parish officers is entitled, on the one hand, to recompence in damages, for an injury received; the law, on the other, wisely interferes for the protection of its *officers*, and to prevent their being harassed with vexatious suits and frivolous litigation. *Protection of parish officers.*

These protections are chiefly created by the following statutes:

43 Eliz. c. 2. s. 19. enables him to plead the general issue, where an action is brought for any thing done under the authority of that act; and if a verdict is found for him, or the plaintiff is nonsuited, he shall recover treble damages, together with his costs. *43 Eliz. c. 2. s. 19. Plead the general issue and have treble damages.*

7 Jac. I. c. 5. and 21 Jac. I. c. 12. enables them to plead the general issue, in actions brought for any thing done, touching or concerning their office, or by virtue thereof. *7 Jac. I. c. 5. 21 Jac. I. c. 12. May plead general issue.*

7 Jac. I. c. 5. gives them double costs where they obtain a verdict, or the plaintiff is nonsuit, or discontinues; and *7 Jac. I. c. 5. Entitled to double costs.*

(1) Farmer *v.* Arundell, 2 Black. Rep. 824.

by

21 Jac. I. c. 12. Plaintiff must bring his action where the cause of it originated.

by 21 Jac. I. c. 12. unless the plaintiff proves the cause of action to have originated within the county in which the action is brought, he shall be nonsuited.

17 Geo. II. c. 38. s. 8. Protects them in case of informal distresses.

17 Geo. II. c. 38. s. 8. protects them against vexatious actions, where they have distrained for non-payment of poor's rates, by enacting, that when the sum the distress is made for is justly due, it shall not be deemed unlawful, nor the parties making it trespassers, on account of any defect or want of form in the warrant for the appointment of the overseers, or in the rate or warrant of distress; but the party aggrieved shall recover full satisfaction for the special damage, and no more, in an action of trespass on the case.

Sect. 8. enables them to tender amends.

By Sect. 8. no plaintiff shall recover for such complaint, if tender of amends hath been made by the parties distraining, before action brought.

24 Geo. II. c. 4. copy of warrant to be demanded.

By 24 Geo. II. c. 44. s. 6. no action shall be brought against any constable, headborough, or other officer, for any thing done in obedience to a justice's warrant, "until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his or her attorney or agent, in writing signed by the party demanding the same, of the perusal and copy of such warrant; and the same hath been refused or neglected for the space of six days after such mand."

Sect. 6. when granted, justice to be made a defendant, &c.

By sect. 6. in case *after such demand* and compliance therewith by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action is brought against such constable, headborough, or other officer, or against any person or persons acting in their aid, for any such cause, without making

making the justice or justices who signed or sealed the warrant, defendants, the jury shall give a verdict for the defendant, notwithstanding any defect in the justice's jurisdiction; but if the action shall be brought jointly against the justices, and also against such constable, &c. or persons acting in their aid, then on proof of such warrant the jury shall find for such constable, &c. and for such persons so acting as aforesaid, notwithstanding such defect of jurisdiction; and if the verdict shall be against the justices, then the plaintiff shall recover his costs, including the costs which he is liable to pay to the defendants for whom a verdict is found.

By sect 7. when the verdict is against the justices, and the judge, before whom the cause is tried, certifies in open court, on the back of the record, that the injury was wilfully and maliciously committed, plaintiff shall be entitled to double costs of suit. Sect. 7. double costs, when ?]

By sect. 8. the action must be brought within six calendar months after the act committed. Sect. 8.

If the officer acting under the magistrate's warrant does not give a copy of the warrant within the six days after it is demanded, which are allowed by 24 Geo. II., he subjects himself to be sued without the justice being made defendant, provided the action is brought before compliance with the demand. But he is entitled to the protection of the statute, if he gives it at any time before he is sued, although it be after the six days are expired. (1) Copy may be given at any time before action brought.

Action of trespass brought by plaintiff against the overseers of the poor, for taking his gelding; the overseers Under 24 Geo. II. c. 44. ci.

(1) Jones v. Vaughan, 5 East, 445.

alleged

title to six days' notice to produce their warrant.

alleged in the pleadings, that by virtue of their office, and in pursuance of a justice's order, they levied satisfaction for a poor's rate, which was the trespass complained of. It was objected on the trial, that by 24 Geo. II. c. 44. demand should have been made of the perusal and copy of the justice's warrant, and six days neglect or refusal; and the judge who tried the cause being of the same opinion, the plaintiff was nonsuited. On an application to the court of king's bench to set aside the nonsuit, it was refused. Lord Mansfield.—Overseers of the poor and churchwardens are clearly within the meaning and protection of this statute. The legislature, by passing this act, intended to extend the benefit of the statute 21 Jac. I. c. 12., and therefore all officers acting under a justice's warrant are included in it. (1)

And to have the magistrate granting it, joined in the action.

Also, trespass being brought for seizing and carrying away a ship's anchor: it appeared at the trial that the defendant, who was a churchwarden, took the anchor as a distress, for non-payment of a poor's rate, under a warrant of magistrates, which was produced. It was held by the court of king's bench, that 24 Geo. II. c. 44. which enacts, "that no action shall be brought against any constable, headborough, '*or other officer*," &c. extended to the defendant, and that he could not be sued alone, but the magistrate, under whose warrant he acted, ought to be joined. For the act was made for the protection of all inferior officers, acting under the warrant of a justice of peace; the design being "that when a warrant is granted to the inferior descriptions of mankind, who cannot judge of the propriety of it, they shall not be harassed with actions for executing it, but that

(1) Nutting v. Jackson, Lofi. 249. 3 Burn, 680.

the

the magistrate who granted it shall bear the responsibility himself." (r)

But the provisions of 24 Geo. II. c. 44. do not extend to the action of replevin. "Where such an action was brought, therefore, against overseers to recover back a distress for a poor's rate, levied by them, under a justice's warrant, it was held to be unnecessary to demand a copy of the warrant, &c. under that statute. For the 43 Eliz. which is the foundation of the poor's rate, considers replevin as a proceeding in which the right to levy by distress, any sums claimed on account of that rate may be properly controverted; for by sect. 19. a form of avowry is given in case of a distress made: and the distress under that statute was in the nature of an execution; for the sums assessed for the relief of the poor are by the 4th section directed to be levied by distress and *sale*: and it would be going very far to say, that so beneficial a remedy is indirectly taken away by the general words of 24 Geo. II. when the provisions which are enacted in that statute, as to the form of plea, &c. are not adapted to the proceedings in replevin: and though it was truly said that prior to 27 Geo. II. c. 20. a demand of the copy of the warrant might have been made, and notice given with effect to the magistrate before the distress was sold, the time for such sale being then indefinite; yet it is not to be intended that the legislature would have passed that act in a way to defeat the remedy by replevin, had it been supposed that the 24 Geo. II. extended to it. In truth the stat. 27 Geo. II. leaves the question upon the construction of the 24 Geo. II. as applied to a poor's rate, where it was before: for

24 Geo. II. c. 44. extends not to action of replevin.

(r) Harper *v.* Carr, 7 Term Rep. 270. Several cases have been decided respecting an overseer's being entitled to costs, and the method of recovering them; but they are omitted, as foreign to the scope of this treatise.

antecedently to 27 Geo. II. a distress taken for the poor's rate under 43 Eliz. c. 2. s. 13. might have been sold immediately; and a replevin in such case, in order to serve the party, must have been sued out as soon as possible after the distress made, without waiting for a copy of the warrant, or the giving notice to the magistrate: and from the incongruity between the steps required and provisions directed by 24 Geo. II. and the proceedings in replevin, in addition to the reasons before given, we think it was not intended by the legislature that the provision of 24 Geo. II. c. 44. should extend to this action of replevin." (1)

(1) Fletcher v. Wilkins, 6 East's 13[illegible] Pearson v. Roberts, Wilson's Rep 283. Milward v. Coffin, 2 Black Rep 6[illegible].

CHAPTER XXXVII.

Of Appeals; from the Entry to the Judgment.

SECT. I.

By what Statutes the Right of Appeal is given against Poor's Rates, and Orders of Removal.

THE principal sources of appeal to the court of quarter sessions are, 1st, Rates made for the poor's relief. 2d, Orders of removal. The right, as given in other cases, has been incidentally noticed, in treating of the particular subject. But as the manner of conducting all appeals is nearly similar, the following observations may be considered as applicable to all, unless where some distinction is particularly noticed.

[illegible]

The right of appeal against poor's rates, and also against overseers' accounts, was originally given by 43 Eliz. which enacts, "that if any person or persons shall find themselves grieved with any sess, or tax, or other act, done by the said churchwardens, or other persons, or by the said justices of peace, then it shall be lawful for the justices of peace, at their general quarter sessions, or the greatest number of them, to take such order therein as to them shall be thought convenient; and the same to conclude and bind all the said parties."

[illegible]

The 17 Geo. II. c. 38. s. 14. enacts, "that in case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment, made for the relief of

17 Geo. II. c. 38. s. 14.

of the poor, or shall have any material objection or objections to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or, themselves aggrieved, by any neglect, act, or thing done or omitted by the churchwardens or overseers of the poor, or by any of his majesty's justices of the peace; it shall be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies: and the justices of the peace, then assembled, are hereby authorized and required to receive such appeal, and to hear and finally determine the same, &c.

2d; Appeals against removals.

The right of appealing against an order of removal is given by 13 & 14 Car. II. c. 12. s. 2. 3 & 4 W. & M. c. 11. s. 9. 10. 8 & 9 W. III. c. 30. s. 6.

SECT. II.

Of the Grounds for appealing. What Persons may appeal, and who may join therein.

I. *Against a Rate.*

1st, Who may appeal against rates.

THE 43 Eliz. c. 2. gives the right of appeal only to persons aggrieved by the rates: that is, to all who are rated and aggrieved, either by an over-rate of their own property and ability, or by an assessment disproportioned to that of other inhabitants and occupiers of property

within

within the parish or township for which the rate is made.

But the 17 Geo. II. c. 38. allows the right of complaint to all "who shall have any *material* objection or objections to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person therein."

Alteration under 17 Geo. II. c. 38.

This act, therefore, extends the grounds of appeal beyond those allowed by 43 Eliz. c. 2. They are pointed out by Lord Mansfield as follows:—The 17 Geo. II. says, that where there is a franchise to be enjoyed, a man shall not be left out to deprive him of his franchise. Now, that act does not say that every man shall be rated, whether able or not; and it is a good defence to a rate to say, that he is poor and unable to pay; and you may object against a man who wants fraudulently to be rated to gain either a settlement or a franchise (1). But no person can sustain an appeal against a particular mode of rating other parishioners, if he does not sustain some injury thereby. (2)

Who may join in appeals against rates

All occupiers, jointly interested in the subject matter of an appeal against a poor's rate, may join in preferring it to the sessions (3). But it is otherwise, perhaps, where the grounds of appeal arise out of distinct property, as

(1) Rex *v.* [illegible], 2 Const. 3 ed. 233. Pl. 262 Burr. S. C. 431.

(2) 41 Geo III. c 23. sect 4 recognizes the right of several persons to join in a notice of appeal, see post this chap 424, and in Rex *v.* Coode, & al. Cald 464, several inhabitants joined. And where the cause of appeal was the omission of certain persons in the rate, it was held that several might join in one notice of appeal, for it is a joint grievance affecting all the appellants in an equal degree. Rex *v.* Whitley, 7 Term Rep. 771. Rex *v.* Justices of Suffolk, 16 East, 206.

(3) Rex *v.* Brown, 8 East, 528 ante, vol. I. 246 (3).

Against overseers' accounts.

they affect the several appellants, and originate from causes altogether distinct and personal. It seems, however, reasonable, that as many of the parish as chuse may join in an appeal against overseers' accounts; for their grievance originates from the same source, and may be heard and redressed by one judgment. (1)

II. *Against an Order of Removal; and the Suspension thereof.*

2d, Who may appeal against removals

The parish to whom the removal is made, is impowered by the statutes already cited (2) to appeal against it. But it has been determined, that the party who is removed may appeal, as well as the parish. (3)

Who parties to the same appeal.

It seems also that more than two or more parishes may be parties to an order of removal, and so by consequence to an appeal therefrom; and the appeal of any one parish brings the others before the sessions. (4)

Of appeals against suspended orders.

35 Geo. III. c. 101. s. 2. provides, that if the parish officers of the parish, &c. to which the order of removal is made shall, upon the poor person's removal or death, refuse or neglect to pay the charges proved on oath to be incurred by the suspension, and by the justices ordered to be paid, "within three days after demand thereof, and shall not within the said time give notice of appeal, one justice may, by warrant, order the money to be levied

(1) This seems to have been done and no objection taken. Rex v. Welch et al'. Cald. 504.

(2) Ante, 384.

(3) Rex v. Hartfield, Carth. 222. Per Holt, C. J. Weston Rivers v. St. Peter's Marlborough, 2 Salk. 492.

(4) Rex v. Colliton, Carth. 221 with proper notice. But orders of this sort seem to have gone into disuse, if they were ever much practised.

by distress, &c. provided that if the sum so ordered to be paid on account of such costs and charges exceed 20l. the party or parties aggrieved by such order may appeal to the next general quarter sessions against the same, as they may do against an order for the removal of poor persons by any law now in being;" and if the sessions are of opinion that the sum awarded is more than ought to be paid, they may strike it out and insert such sum as in their judgment ought to be paid.

It is decided upon the construction of this clause; 1st, that an appeal lies against an order of removal which was suspended, and against a subsequent order for costs, notwithstanding the pauper's death prior to her removal, and though the costs are under 20l.; for 3 W. & M. c. 11. s. 9. gives an appeal to the party aggrieved by the justices' determination respecting the pauper's settlement; and though the grievance grows by a subsequent statute, the party is still aggrieved by the order of removal. Before 35 Geo. III. there was no grievance to the parish to which the order of removal was made until it was executed; but that statute attaches a contingent consequence to the order of removal, being coupled with the order for payment of costs, which makes it a grievance, though the pauper died before any removal in fact took place. Then the appeal against the order for costs is not against the *quantum*, but against the liability of the parish to pay any costs at all in this case, taking it as a consequence of the order appealed against. (1)

2. That the meaning of that part of the clause which mentions the demand and notice of appeal within three days, is, "that if the party aggrieved by the order, and intending to appeal against the amount of the charges,

(1) Rex *v.* St. Mary le Bow, 13 East, 51.

will give notice of appeal within three days after demand made, he shall be relieved from the inconvenience of a distress; but though he neglect to do so, he only subjects himself to that inconvenience, but his right of appeal, which is afterwards given, is not thereby taken away; and if he afterwards think proper to appeal within the time allowed by law for appeals against orders of removal, he is expressly empowered so to do. Then if the order is quashed, or the sum directed to be paid reduced upon an appeal, it is a consequence of law that the money paid upon it must be refunded by those who received it, or an action for monies had and received will lie to recover it back again. (1)

SECT. III.

To what Sessions an Appeal must be made in point of Jurisdiction.

I. Appeals against poor's rates.

By 43 Eliz. 1. Appeal against rates to the general quarter sessions, &c.

Under 43 Eliz. c. 2. s. 6. it must be to the *general quarter sessions* for the county, provided the place for which the rate is made be within that jurisdiction. But sect. 8. enables the justices of peace of towns, places corporate, and cities, at their quarter sessions (if they hold any), "to do and execute for all the uses and purposes in this act prescribed, and no other justice or justices of the peace to enter or meddle there."

Jurisdiction reserved to

Under this section, therefore, the appeal against a rate, made for any parish or place within corporate towns, places,

(1) Rex v. Bradford, 9 East, 97.

places, or cities, must be to the corporation sessions, and cannot be to the general quarter sessions of the county; for the justices at the quarter sessions for the county have no jurisdiction, as there are negative words in the clause which excludes them. (1)

corporate justices.

But sect. 5. provides, that in all corporations or franchizes, who have not four justices of the peace, persons, if they think fit, may appeal to the general or quarter sessions for the county, riding, or division, wherein such corporation or franchize is situate.

Sect. 5. gives party rated, within a franchise not having four justices, an appeal to the county sessions.

The words of the act, if literally taken, extend only to corporations not having four justices in fact: and it has never been determined, whether an appeal lies to the county sessions from places where, although there are four justices, so many cannot sit to hear the appeal, either from interest in the question, or other circumstances of legal incompetence.

Quære, if less than four by reason of interest?

17 Geo. II. c. 38. s. 4. gives the "appeal to the *next general or quarter sessions* for the county, riding, division, corporation, or franchise, where such parish, township, or place (2) lies."

17 Geo. II. c. 38. s 4.

And it has been decided that notwithstanding the expression *general or quarter sessions*, the appeal must be made to the general quarter sessions notwithstanding the intervention of a general sessions: For it appears from other parts of the act as well as from other statutes made *in pari materia*, that the word *general* is not used with a view to those places that have both general and quarter

(1) Rex *v.* St. Mary in Taunton, 1 Bott, 265, Pl. 260. S. C. ib. Pl. 261.

(2) For which the rate is made.

sessions, such as London and Middlesex, but as another word for quarter sessions in contradistinction to a special sessions, every quarter sessions being a general sessions. (1)

II. As

(1) Rex v. Justices of London, 15 East, 632. Lord Ellenborough, C.J. This was a motion for a mandamus to enter continuances upon an appeal by John Stocks, against a poor-rate: and the question was, whether in London, where there are eight sessions every year, four *general quarter* sessions, and four *general* sessions, a party is bound to appeal to the *general* sessions, if they occur first after the rate; or whether he is entitled to pass over the *general* sessions, and appeal to the next *general quarter* sessions? The rate in this case was published in the church on the 28th October, 1810; the next general *quarter* sessions were on the 29th of the same month, but as there was no interval between them and the publication, it could not be expected that the appeal should be made at those sessions. The next *general quarter* sessions were in January 1811; and to that sessions Mr. Stocks appealed; but as a *general* session had intervened, the question is, whether the appeal was not out of time. The appeal was adjourned to the three following quarter sessions; and at an adjournment of the October quarter sessions, in November 1811, the sessions decided that Mr. Stocks had not appealed in time; and on that ground dismissed the appeal. By the stat. 43 Eliz. c. 2. s. 4, if any person shall find himself aggrieved, the justices of peace, at their *general quarter* sessions, shall take such order therein as to them shall be thought convenient. This statute therefore gave the appeal to the quarter sessions indefinitely without even limiting it to the next which should occur. By stat 17 Geo. II. c. 38. s. 4. a person aggrieved may appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where the township, parish, or place, for which the rate is made, lies: but if it shall appear that reasonable notice was not given of the appeal, the justices shall adjourn it to the next quarter sessions, and then finally hear and determine it. And the said justices may award to the party, for whom the appeal shall be determined, reasonable costs, in the same manner as they are empowered to do in case of appeals concerning the settlement of poor persons by stat. 8 & 9 W. III. c. 30. This statute therefore limits appeals (in terms) to the next general or quarter sessions, and the question is, whether the word "*general*" is used with a view to those places which have both general and quarter sessions, as London and Middlesex; or whether it is not used as another word for quarter sessions, in contradistinction to a special sessions; every quarter sessions being a general session? And we are of opinion that the latter is the true construction; and that an appeal to the next quarter sessions, notwithstanding the intervention of a general sessions, is in time. The direction to adjourn to the next quarter sessions, if proper notice be not given, dropping the word general, falls in with the notion that the legislature used it in

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II. As to appeals against orders of removal. 2. Appeals against removals.

There is a difference in the wording of the several statutes, by which this right of appeal is given or confirmed. 13 and 14 Car. II. c. 12. provides, "that all such persons who shall think themselves aggrieved by any judgment of the said two justices, *may appeal to the justices of the peace of the said county* (1) *at their next quarter-sessions*," &c. 3 and 4 W. and M. c. 11. s. 10. enacts, "that all persons who thinks themselves aggrieved with any such judgment of the said two justices, *may appeal to the next general quarter sessions of the peace to be held for the county, riding, city, town corporate, or liberty, from which the said person was so removed.*" But it is enacted by 8 and 9 W. III. c. 30. s. 6. "that the appeal against any order for the removal of any poor person from any parish, township, or place, shall be had, presented, and determined *at the general or quarter sessions of the peace for the county, division, or riding*, wherein the parish, township, or place from whence such poor person shall be removed, doth lie, and not elsewhere, any former law or statute to the contrary notwithstanding."

13 & 14 Car. II. c. 12. s. 2.

3 & 4 W. III. c. 30. s. 6.

8 & 9 W. III. c. 30. s. 6.

the sense we adopt; for if these appeals were to be heard at the general sessions, which intervened between the quarters, no reason can be given why the adjournment should not have been to the next general as well as to the next quarter sessions. The direction, too, as to costs raises an inference that this is the right construction; for no costs can be given under the stat. 8 & 9 W. III. but at the quarter sessions; inasmuch as the appeal against an order of removal is, under the stat. 13 & 14 Car. II. c. 12. s. 2., confined to the quarter sessions. The next section, too, in the stat. 17 G. II. c. 38. viz. s. 5., speaks of the general or quarter sessions for a county, riding, or division; whereas there is no county but Middlesex, in which there are in fact general sessions in addition to the quarter sessions; and they do not occur in any riding or division. We therefore think that the appeal was in time, and that the rule should be made absolute.

(1) i. e. in which the order of removal is made.

8 & 9 W. III. transfers appeals to the county sessions in limited jurisdictions.

This latter statute takes away from limited jurisdictions the power of hearing appeals against orders of removal, given them by 3 and 4 W. and M. c. 11. s. 10. So that now all appeals against orders of removal, made by magistrates of a limited jurisdiction, must be to the next sessions for the county, riding, or divison, in which the place is situated from which the removal is made. (1)

Two justices of St. Alban's (which is a limited jurisdiction) made an order of removal to Wendover, which was confirmed upon appeal to the quarter sessions of St. Alban's. The court of King's Bench quashed the order of sessions, because the appeal ought to have been to the sessions of the county, and not of the corporation. (2)

Order confirmed by borough justices a nullity, and not made valid by respondents appearance, &c.

And an order made at sessions upon such an appeal is so much a nullity, that it cannot be rendered valid by the appearance of the respondents at the borough quarter sessions, their entering into the merits of the question, and settling a case for the opinion of the court of King's Bench.

Two justices for the borough of Colchester made an order to remove three paupers from St. Giles in Colchester, to East Donyland in Essex; East Donyland appealed to the quarter sessions of the borough of Colchester,

(1) The reason why the jurisdiction, allowed to the magistrates of borough sessions in appeals against poor rates, is taken away from them, in appeals against orders of removal, seems to be, that the allowance of rates being a ministerial act, they do not, in the case of a rate, sit in revision upon what they have themselves done. But an order of removal is a judicial act, in which they must do so, when deciding upon an appeal against it. See Reg. v. Malden, post, 393.

(2) Rex v. Wendover, 13 W. III. 2 Salk. 490. 2 Bott, 713. Pl. 792. The jurisdiction of the justices of the liberty of St. Alban's is reserved by sect. 8. of 8 & 9 W. III. c. 30.; so that this seems to have been an appeal against an order of removal, made by justices of the corporation of the town of St. Alban's.

and

and they confirmed the order, and stated a special case. It was objected, that the appeal ought to have been to the quarter sessions of the county, and not of the borough, by 8 and 9 W. III. c. 30. s. 6. The court agreed, that the borough sessions had no jurisdiction to make this order of confirmation; and that, therefore, their opinion and their orders were both nugatory: the appeal ought to have been to the quarter sessions of the county; and as no such appeal had ever been made, the original order stands. The rule to shew cause, therefore, why it should not be quashed, must be discharged. (1)

The words and reason of the statute seem also to give the appeal to the county sessions, where both the parish, *to and from which the removal* is made, is situate within a limited jurisdiction. For by Lord Parker, where there is a town corporate, that has sessions of their own, and the justices within that town make an order *there*, they must appeal to the county sessions, and *not to their own sessions*; for then there would be an appeal *ab eodem ad eundem*, there being (may be) the same justices sitting who made the order. (2)

Appeals against removals taken away from limited jurisdictions.

(1) Rex *v.* East Donyland, Burr. S. C. 592.

(2) The parish of Malden in Essex, Cases of Sett. and Rem. 6. 2 Bott, 719. n. (a). although the Chief Justice's words do not literally comprehend the point in question, yet they evidently refer to it. For when he says, that the parish cannot appeal *to their own sessions*, he thereby intimates that the parish appealing, *i. e. removed to*, is situate within the borough. This reasoning seems also strengthened by 16 Geo. II. c. 18. s. 3. which prohibits justices from acting in the determination of any appeal, relating to any parish, &c. where such justices are *charged, taxed, or chargeable*. See post.

SECT.

SECT. IV.

Of entering Appeals, and at what Sessions it must be in point of Time.

It was observed by Holt, C. J., that "it is a regular way, in cases of appeals to the sessions about settlement, to enter the appeal before the two justices that made the order, and they to return the order with the appeal into the sessions:" Powel, J. said, they always did otherwise; however, this would be a good rule. (1)

Appeals now and when entered of course

But this rule seems never to have been followed; and in modern practice the first step towards enabling the sessions to hear an appeal is, that it be entered by the clerk of the peace in the proceedings of the court. This is done as a matter of course upon the appellant's application, where the appeal is lodged within the time prescribed by statute, and is to be heard at the sessions at which it is lodged. It may be entered at the clerk of the peace's office, before or after the sessions commence. But all courts, for the purposes of convenience, limit a particular time after the sessions are begun, beyond which an appeal is not to be received by the officer, as a

How entered.

(1) Anon. 19 Vin. 353.

matter

matter of course (1), in order to be set down for hearing at that sessions. (2)

Wherever, therefore, an appellant does not enter his appeal within the time prescribed by the practice of the court; or wishes to have it entered, and the hearing respited to the ensuing sessions; or to have it entered upon special grounds at a sessions, different from that at which *the words* of the statutes direct it so to be; he must make a special application to the justices by motion (of counsel where they attend), to dispense with their usual rule in that particular instance. In what cases the court must be moved for leave to enter.

The rules respecting entering appeals may be reduced to two heads:

I. At what sessions they must be entered. II. Of the remedy to compel justices at sessions to enter and hear an appeal, where they have improperly refused to do so.

(1) The practice of sessions varies in this respect, and has been fixed in general, with a view to the average business of the court. At the Surrey sessions an appeal may be entered at any time before the rising of the court, in the afternoon of the second day of the sessions, which is there the first day of judicial business; the preceding day being occupied in matters relating to the general police of the county. At the Hereford sessions, the practice is not to receive any appeal after the morning of the day on which the sessions commence. See Rex *v.* Justices of Herefordshire, 3 Term Rep. 504. At the Gloucestershire sessions they must be entered by 12 o'clock the second day.

(2) That the court are bound to receive the appeal at the next session after the order of removal has been executed, whatever their practice may be in this respect. See Rex *v.* Justices of Leicestershire, post. 399. Rex *v.* Justices of Buckinghamshire, post. 412. and the other cases cited there. See also Rex *v.* Justices of Berkshire 1 Const. 274. Pl. 288.

I. At what Sessions Appeals must be entered.

Against rates, under 43 Eliz. appeal might be to any session.

An appeal against a rate might, under 43 Eliz. c. 2. s. 6., have been made to any general quarter sessions, subsequent to publishing the rate(1). The manifold inconvenience of suffering appeals against the same rate to be discussed at different periods, and its being liable to be quashed long after the escape from office of those overseers, by whom it was made, and the assessments collected, made it necessary to alter the law in this particular.

17 Geo II confines appeal to the next sessions after party aggrieved.

The 17 Geo. II. c. 38. s. 4. therefore enacts, that the appeal shall be to the *next* general or quarter sessions of the peace for the county, &c.

It was formerly contended, that as this statute neither expressly annulled the 43 of Elizabeth, nor contained negative words from which a repeal must be implied, both might be considered as subsisting together. That as 17 Geo. II. gave costs, the party must appeal to the next sessions, as is required by that statute, to entitle himself to them, but if he chose to forego this advantage, he might still appeal to any other sessions under the 43 Eliz.

Repeals 43 Eliz. c. 2.

The court, however, decided, that the 43 Eliz. c. 2 was repealed in this particular by 17 Geo. II. c. 38. and

(1) Rex v. St Giles, 11 Mod. 1 Bott, 264. Pl 257. ib. 265 Pl. 259. 16 Vin. Abr. 417, S. C. 259.

that

that the appeal must in all cases be to the next sessions after the party is aggrieved. (1)

The party is held to be aggrieved, within the meaning of the statute, by *making the rate*. He must, therefore, appeal to the next sessions after allowance and publication, and cannot lie by until called upon to pay the assessment of which he complains. (2) Party aggrieved by making the rate. Appeal to next sessions after the allowance.

In cases of appeals against rates as well as against orders of removal, it has been decided that by the next sessions is meant the next practicable sessions at which an effectual appeal can be lodged. A rate was made on the 6th of October, and published on the next day (Sunday), in the parish church, and the sessions was held on the 8th, being only one intervening day between the publication and the quarter sessions, which appellant swore was too short a time to enable him to inspect the rate, to see whether the inequalities in the former one were continued, and property omitted in former assessments was inserted, so as to enable him to determine whether he should appeal against it. On appeal to the Epiphany sessions, it was dismissed then, as being out of time. But the court granted a mandamus to compel them to hear it, and asked why the parish officers made their rate so close upon the time of the sessions; it appeared as if they had done it with a view of ousting the parties of their appeal. (3)

(1) Rex *v.* Coode, Willes, J. contra. Cald. 464. 1 Bott, 276. Pl. 270. S. C. Rex *v.* Micklefield, Cald. 507. See also Rex *v.* Justices of Berkshire, 1 Bott, 309. Pl. 322. Upon any other construction it would be in the appellant's power to deprive the parish of its costs, which it is entitled to, under 17 Geo. II. c. 41, where the appeal is decided in its favour.

(2) Rex *v.* Micklefield, ante, (1). Rex *v.* Atkins, 4 Term Rep, 12.

(3) Rex *v.* Justices of Sussex, 15 East, 206.

Appeals

Appeals against removals entered next sessions after the removal.

Appeals against orders of removal must be made to the next sessions after the removal of the paupers under it; for it is thereby that the parties are aggrieved (1). Although it appear therefore, on the order of sessions, that a sessions has intervened between the date of the original order and that one at which the appeal is entered, yet the court will not therefore quash the latter as not being made in time; for the order may not have been served until after the first sessions (2); and the justices are bound to receive it in all cases when presented at their next sessions after the removal.

Where order abandoned.

A rule was moved for to shew cause why a mandamus should not issue, directed to the justices of the peace for the county of Leicester, commanding them to proceed upon the appeal of the inhabitants of Stoke-Golding, against an order of removing a pauper, his wife, and four children, from Castle-Donnington to Stoke-Golding. This was grounded on an affidavit, stating, that the order was made in January last, and notice of appeal given. That the inhabitants of Castle-Donnington, discovering that the woman was not the pauper's wife, and so the children illegitimate, agreed to take the woman and children back, which they did, and the order of removal as to them was considered to be at an end. That afterwards, and before the sessions, a new order was made, removing the woman and children from Castle Donnington to Sibston, against which Sibston appealed, when the sessions were of opinion, that the former order of removal not having been regularly appealed from, and quashed, was conclusive on Stoke-Golding, and for that

(1) Rex v. Monks, Risborough, 2 Bott, 714. Pl. 793. Millbrook v. St. John's, Southampton, ib Pl. 794, Sett. and Rem 66 Rex v. Norton, 2 Str. 831. Road v. North Bradley, 2 Str. 1168 Rex v. Turley, 1 Sess. Cas. 175, Pl. 215. and see Rex v Justices of Sussex, 7 Term Rep 107. post. 401. (1).

(2) Millbrook v. St John's, Southampton, and the cases cited ante, (1). Ser 1 Const. 306.

 reason

reason were proceeding to quash the second order of removal to Sibston. That the attorney for Stoke-Golding happening to be in court, *then* desired that their appeal against that first order might be heard; but the justices refused it, though it was the first session after the order made. He then proposed that the sessions should permit the case to be stated for the opinion of the court of King's Bench, whether the first order, under these circumstances, was conclusive? but this was also refused. Cause was shewn against this rule, on the ground that it is the custom at Leicester for all appeals to be entered on the first day of the sessions; but this appeal was presented afterwards; and the parish of Castle-Donnington agreeing to take the party back was nothing. Mr. Justice Buller said, they ought to have proceeded on the appeal: they were bound to receive it; it was presented at the next sessions.—Per Cur. Rule absolute for a mandamus. (1)

But although by the next sessions, to which the statutes require appeals to be made, both against rates and orders of removal, are meant those which happen next after the party is aggrieved, still distinctions must arise as to what shall be considered the *next* sessions. For a cause of appeal may arise after a sessions has commenced, and before its termination. Or it may occur so immediately upon the eve of a sessions, as to render it impossible for the party to lodge it in due time. (2)

1. Next sessions means the first original sessions after the grievance.

Upon the first point it has been held, that the appeal must be to the first original quarter sessions after the party is aggrieved; and, that where a sessions commenced before the cause of complaint accrued, and was

(1) Rex *v.* Justices of Leicestershire, 1 East, 686.

(2) See ante, 397.

after-

afterwards continued by adjournment, the appeal should be entered at the ensuing sessions, and not at such adjournment. (1)

The commencement of original sessions must appear in their order on appeal

Thus, an order made "*at the next general quarter sessions held by adjournment*" was quashed; because it did not appear *that this was the next general quarter sessions*, for it might be that the general sessions was begun and continued by adjournment before the order was made. (2)

Appeals where county has two divisions.

There are two divisions (though not legally recognized), the eastern and western, in the county of Sussex, and but one commission of peace for the county; and the quarter sessions are always held, first, in the western, and afterwards adjourned into the eastern division. The sessions commenced in the western division on Tuesday. The removal in question was made on the Wednesday, 13th July, into the parish of Peasmarsh, which is in the eastern division, the adjournment day into which was on the Friday following. The appeal was not lodged at the sessions, but was preferred at the next October sessions, held by adjournment in the same eastern division. The court of quarter sessions were of opinion, that the adjournment sessions in July was the next possible sessions, at which the appeal ought to have been preferred, and that they had no jurisdiction to examine the merits afterwards. Lord Kenyon, C. J.—"The convenience and justice of the case are so obviously in conformity with

(1) S. P. as to appeals against orders of filiation and maintenance, ante, 279. The sessions, while it continues, is in law considered as but one day; and the continuance from day to day need not be set out. See post. If, therefore, the cause of appeal arise (as above mentioned) after the session has commenced, that session can have no jurisdiction to entertain such appeals infra, (2).

(2) Reg. v. Hinderclave, 19 Vin. Abr. 336. 2 Bott, 714. Pl. 775.

 the

the strict letter of the statute, that there can be no doubt on the proper construction of it. There is but one commission of the peace, and one quarter sessions, held for the county in each quarter; although, for convenience, the magistrates hold the sessions, first in one part of the county, and then by adjournment in the other part. The next quarter sessions, therefore, must necessarily mean the next original quarter sessions held for the county; for the adjournment is only a continuation of the same sessions. The removal, therefore, having been made after the commencement of the July sessions, the appeal was properly preferred at the October sessions following. Neither is there any thing in the objection, that it ought then to have been made to the original sessions in October, for that would be directly contrary to the practice which has always prevailed in counties where the sessions are adjourned from one place to another within the county. (1)

But it may be lodged at any adjournment of such next original sessions.

It was likewise decided in the foregoing case, that as an adjournment is a continuance of the original sessions, an appeal may be lodged at an adjournment of the next sessions as well as at their original commencement, where they are adjourned from one place to another for public convenience. (2)

Appeal not heard at an adjournment.

As the session, how many adjournments soever there may be, is considered but as one day in law, there seems no reason why an appeal should not be lodged and heard at an adjournment, as happens where the sessions adjourn from one division of the county to another (3).

(1) Rex v. Justices of Sussex, 7 Term Rep. 107. His Lordship referred to Rex v. Monks, Risborough, ante. 398 (1), and Reg. v. Hindercleave, ante, 400. (2).

(2) Ib.

(3) But no appeals are tried nor business done within each division other than what originates there, the divisions being considered in this respect as if they were distinct counties.

But by the practice of many courts of quarter sessions, where the county is not so divided, an appeal may be lodged at an adjournment, though it cannot be heard there. Such is the case in Surry, where an appeal may be lodged at an adjournment, and respited to the next session (1); but it cannot be set down for hearing at an adjournment, unless by the concurrence of parties, and upon a sufficient special ground being stated, when the court will sometimes allow them to lodge an appeal at the original sessions, and respite the hearing to the adjournment day.

But if adjournment fails, no appeal to ensuing sessions.

But the party who neglects to appeal at the original sessions, and defers it to an adjournment, does so at his peril. For if no sessions are held pursuant to the adjournment, the original sessions are completed, and the justices have no jurisdiction to entertain his appeal at the ensuing sessions. (2)

2. Next sessions means the first possible sessions

It has been held, that the words, "next sessions," in the statute, mean the next to which the party can *by possibility* appeal after he is aggrieved. (3)

That question of fact.

What is the next possible sessions, must ever remain a question of fact, depending upon the circumstances of each particular case. The following decisions are reported on this subject.

Instances when second sessions after party aggrieved held the next possible sessions.

Mandamus to receive an appeal. The order of removal had been made on the 22d September, but the pauper was not removed till the 5th of October. Hull, the place to which the pauper had been removed from Whitby, is sixty miles from Northallerton, where the

(1) See post. 408.

(2) Rex *v.* West Torrington, Burr. S. C. 293.

(3) Per Ashhurst, J. Rex *v* Coode, ante, 396. (2). eodem Jud. Rex *v.* Micklefield, ibid. Cases of appeal against rates.

sessions began on the 6th of October. At that sessions no appeal was entered, and at the Epiphany sessions following, which began on the 12th of January, the parish having offered an appeal, the justices refused to hear it, thinking themselves bound by the words of 13 & 14 Car. II. c. 12. s. 2. which says, that persons aggrieved may appeal to the justices of peace, "at the next quarter sessions." But the court of King's Bench said, that by "*next sessions*" the statute of Car. II. must have meant the next possible sessions; and that here it was impossible for the appellants to lodge their appeal at the Michaelmas sessions. (1)

Mandamus to enter and hear an appeal granted.

On a rule for a mandamus to the defendants, to receive an appeal against an order of removal, it appeared that the order was dated on the 24th of September last, and executed on Monday the 3d of October, at 4 o'clock in the afternoon, at Leek, which was at the distance of 54 miles from Mold, where the Flintshire sessions were holden, on Thursday the 6th of October. No appeal having been entered at this sessions, the justices at the January sessions refused to receive it, though it was stated to them, and now verified by affidavit, that the overseer of Mold, who conveyed the paupers to Leek, could only speak the Welsh language, and that the overseer of Leek, who received them, could not understand him; that near a week elapsed before the parish of Leek could gain any information respecting the settlement of the paupers, and consequently that they were not in a situation to appeal at the next Michaelmas sessions.

In shewing cause against this rule, an affidavit was produced in answer, in which it was stated, that the over-

(1) Rex *v.* Justices of the East Riding of Yorkshire, Doug. 192. 2 Bott, 719. Pl. 702.

seer of Mold, when he conveyed the paupers to Leek took one Price with him, for the purpose of explaining the circumstances of the case, and when parting, said, "he must make the best of his way home to attend the sessions at Mold:" it was also stated, that the order of removal was not executed before the 3d of October, on account of the resistance and threats of the pauper. Lord Kenyon, C. J.—"We ought not to decide hastily against the words of an act of parliament; *but some reasonable time ought to be given the parish appealing, to enable them to enquire whether or not it will be proper to enter an appeal.* In this case the order of removal, which was made on the 24th of September, was kept in the overseer's pocket until the eve of the sessions, and was then executed at the distance of more than 30 miles from the place where the appeal was to be lodged. And though the sessions were holden at Mold on Thursday, in general they were holden on Tuesday, and the overseers of Leek might fairly have conceived that the sessions for Flintshire would be holden on the very next day after the order was executed. Under these circumstances, therefore, I think that the justices at the following sessions, in January, ought to have received the appeal." (1)

Mandamus refused.

But where an order was made four days before the sessions commenced, and the sessions lasted three days more. The contending parties were not more than ten miles from each other, and the place of the sessions not above eight miles from the party complaining. A mandamus being moved for, Lord Mansfield, C. J.—The single question is, whether the sessions have done wrong in (2) admitting the excuse offered for not appealing at

(1) Rex *v.* Justices of Flintshire, 7 Term. Rep. 200.

(2) So in all the editions of Mr. Const's work, but the sense seems to require that it should be read "in *not* admitting."

the next sessions after the order of removal. For all the facts of imputation thrown out against the removing parties are out of the case. Whether there is a sufficient time for not appealing, must depend upon the facts of every case. Here the two contending parishes, and the place where the sessions were held, were within ten miles, or thereabouts. It is said the parish wanted to know if the wife of the pauper was settled with him, which depended upon the age of him; a fact they might have known in less than half an hour. Here the parish officers were negligent. Rule for the mandamus discharged. (1)

Likewise, on a rule to show cause why a mandamus should not issue to the defendants, to receive an appeal against an order of removal. It appeared that the order was made on Friday, the 18th of April; on the 19th, the pauper was removed; and on the Tuesday following, the 22d, the Easter sessions were held at Hereford, 20 miles distant from the parish to which the party was removed, at which sessions it is the practice not to receive any appeal after the Tuesday morning. The parish not having appealed at those Easter sessions, the justices at the Midsummer sessions refused to receive the appeal, because not made at the next quarter sessions, according to 13 & 14 Car. II. c. 12. s. 2. The foundation of the application was, that as the officers of the parish to which the pauper was removed had not sufficient time to convene a meeting of the inhabitants, in order to take their opinion upon the subject, whether there were any grounds for the appeal, the Midsummer sessions were the next possible sessions. Lord Kenyon, C. J.—The words of the act of parliament are very strong, and they require the appeal to be made at the Mandamus refused.

(1) Rex *v.* Justices of Wilts, 2 Bott, 757. 799.

next sessions after the grievance. Where, indeed, an order *of removal has been made some time before, and only executed a very short time before the sessions, so that there was no possibility of appealing to those sessions*, this court has interfered by granting a mandamus, to compel the justices at the following sessions, to receive the appeal, because the words "next sessions" mean "the next possible sessions." But this is a very different case, for there were two intervening days after the execution of the order, and before the Easter sessions; and if there was not sufficient time before those sessions to give reasonable notice of appeal, the appeal might have been then entered and adjourned, according to the statute 9 Geo. I. c. 7. s. 8. Rule discharged. (1)

Mandamus. Practice of session not sufficiently promulged.

The Appellant's attorney was applied to by the parish officers of Storeston on the 19th of April, to enter an appeal against an order of removal, and get it respited till the next sessions, and he gave notice to the respondents, of the appeal and respite. At the next sessions, which were on the 26th of April, an appeal was entered, and respited to Midsummer sessions, held the 26th of July. On the 2d of July, the appellant's attorney learned, for the first time, that the sessions had made certain rules for their practice, which were not published till after the April sessions, nor acted upon, nor officially circulated till the Midsummer sessions, and required, that in all kinds of appeals, the notice of trial should be given in the week on or before the Monday in the week next before the sessions, otherwise to be deemed insufficient, and that the like notice should be given in the case of respited appeals. Notice of trial was served on the respondents on Tuesday, the 5th of July, at six in the morning, dated the day before, being as soon as the

(1) Reg. v. Justices of Herefordshire, 3 Term Rep. 504.

signatures

signatures of the parish officers could be obtained. On the hearing of the appeal at the July sessions, the respondents objected, that the notice had not been given in time; when the appellants applied to the court for an adjournment under these circumstances, offering to pay the costs of the day, but the court refused it, thinking they had no power to do so. Upon a motion for a mandamus to the justices to enter continuances, and hear the appeal, the Court of King's Bench were of opinion that the magistrates had a discretion to exercise, with respect to what was a reasonable time for giving notice of appeal, but the court had a kind of visitatorial jurisdiction over them, in the exercise of that power; and as the sessions had recently made a new mode of practice, of which the appellant's attorney not having knowledge, conformed himself to the former practice, it would be too much to exclude the appellants from having their case heard. (1)

Rule on defendants to shew cause, why a mandamus should not issue, commanding them to receive an appeal against an order of two justices, by which George Kellaway and his family were removed from Richmond and Mortlake, both in the county of Surry. Mandamus, though an adjourned sessions,

The application was founded on the affidavit of one of the parish officers of Mortlake, which stated, that the order of removal dated on the 11th January then last, was executed in the afternoon of that day; that the sessions for the county of Surry began on the next day, viz. the 12th January; and that there was not sufficient time to procure any information respecting Kellaway's settlement, or the requisite evidence to support an appeal,

(1) Rex *v.* Justices of Wiltshire, 10 East, 404.

or even to ascertain whether such appeal ought to be made: that, according to the practice of the sessions in the county of Surry, notice must be served on the respondent parish by the appellant of their intention to try such appeal, at least six clear days previously to the commencement of the sessions: that due notice having been given for the Easter sessions, the appeal was accordingly entered, but the court refused to hear the appeal, on the ground that it ought to have been entered at the Epiphany sessions, and respited until the next sessions.

Park and Laws shewed cause, and relied on the affidavit of Charles John Lawson, Esq. clerk of the peace for the county of Surry, which stated, that by the course and practice of the several quarter sessions held for the said county, (which sessions are always adjourned for a certain time,) appeals on orders of removal of a pauper may be and are lodged at any time during the sitting of the next general quarter sessions, or at the adjournment thereof, held after the making any such order, without notice thereof being given to the respondents; and that the consideration of such appeal is thereupon adjourned to the next general quarter sessions after that in which it is so lodged as aforesaid. And further, that the last Epiphany general quarter sessions of the peace for the said county commenced on the 12th of January 1813, and lasted 14 days, when the same was adjourned to the 2d of February following, (which adjournment lasted one day,) and again adjourned to the 1st of March then following, which adjournment lasted two days. It was stated also, that Newington, where the Epiphany sessions were holden, was distant only eight miles from Mortlake. They admitted, that the words of the statute 13 & 14 Car. II. c. 12. s. 2. which directs the appeal to be at the next

quarter

quarter sessions, meant the next possible session (1); but in the present case, adverting to the practice as set forth in the affidavit of the clerk of the peace, the Epiphany sessions must be considered as the next possible sessions; for it appeared, that the appeal might have been lodged at any time during the sessions, or adjournment thereof, without notice to the respondents. [Bayley, J. How can parties who live in distant counties know what the practice is?] The appellant parish was in Surry; and, therefore, must be presumed to be cognizant of the practice. The facts of the present case are stronger than they were in Rex v. Justices of Herefordshire (2), where a similar application was refused; for there the sessions were holden at Hereford, 20 miles distant from the parish to which the party was removed; here the distance was only eight miles. Besides, in that case the practice was, not to receive any appeal after the first day; whereas, at the Surry sessions, the second day of the sessions is the first at which an appeal can be lodged: and, in addition to this, there is always an adjournment, which does not prevail in other counties; so that here the party had an opportunity not only of entering the appeal during the original sessions, which continued 14 days, but also at either of the two adjourned sessions, the last of which were holden as late as the 1st of March.

Nolan in support of the rule relied on Rex v. Justices of London. (3)

Lord Ellenborough C. J. The statute does not contemplate the continuance of the sessions. It says "at the next quarter session" without adding the words "or some adjournment thereof." It takes the sessions as the

(1) Rex v. Justices of Yorkshire, Dougl. 192, 4th ed.

(2) [illegible] Term Rep. [illegible]

(3) 15 East, 632.

only

only period of time, and they are always considered in law as one day, to whatever time they may by accidental causes be extended. The appellant parish ought to have reasonable time allowed for considering, whether they will appeal or not. We are of opinion that the interval between the 11th and 12th of January was not sufficient for the purpose. Bayley, J. referred to Rex v. Justices of Flintshire (1). Per Curiam. Rule absolute. (2)

Entry allowed when appeal not entered at the next sessions, by agreement to refer.

It seems also where an appeal is prevented from being heard at the next sessions, by agreement between the parties, in expectation of their difference being settled in another way, that the appeal may be entered at the ensuing sessions

Reference to counsel's opinion, which turned out hypothetical, and not given upon the justices' statement.

On a removal from W. to P. it was agreed by the officers of both parishes to refer the case to the opinion of counsel, provided it was given on or before the 14th of January, the sessions beginning on the 15th. The opinion was given on the 10th, but was not decisive, the settlement being made to depend upon a fact not stated in the case. On that day the officers of W. told those of P. that the opinion was not decisive, and they must enquire into the fact referred to. At the sessions on the 15th, no appeal was entered. At the Easter sessions P. appealed. The justices at sessions refused to enter it, as a sessions intervened since the removal. On a motion for a mandamus to compel them to do so, it was argued, that under the agreement the opinion was in favour of P. and was conclusive; and that P. had been prevented from appealing, in consequence of the objection made, not having been raised previous to the Epiphany sessions.

(1) 7 Term Rep. 200.

(2) Rex v. Justices of Surry, East. 53 Geo. III. Maule and Selw. MSS. See Rex v. Justices of Dorset, 15 East, 200., and Rex v. Justices of Sussex, ib. 206.

Lord

Lord Mansfield — As both parties had agreed that this question should be submitted to counsel, and that his opinion should conclude, though the court does not agree with him in point of law, they would not, had the opinion been positive, have granted the mandamus. But the opinion was hypothetical only, and upon a state of facts at the time not settled, and submitted to by the parties. The case, therefore, might be considered as open to the interposition of the court. But the merits appearing clearly against the party applying, the court, to prevent further litigation and expence, refused the rule; and on account of some misconduct with respect to the affidavits laid before the court, on the part of the prosecutors, discharged it with costs out of pocket. (1)

A rule was obtained to shew cause why a mandamus should not issue to the defendants, commanding them, at their next general quarter sessions, to receive, proceed upon, hear and determine, the appeal of the churchwardens, &c. of the parish of North Bradley, against an order for the removal of Jacob Smith, his wife, and children, from Westbury to North Bradley. The affidavits stated, that by one of two general orders, both dated 3d Dec. 1800, John Smith and his wife, and by the other, Jacob, their son, his wife and children, were removed from W. to N. B. That two notices of appeal were given by N. B. against these orders, for the then next quarter sessions, to be holden the 13th Jan. 1801. That one of the overseers of N. B. instructed his attorney to consent, on the part of N. B. that as both parishes were assured that the settlement of the son and his family was derived from the father, the appeal to the son's order

Appeal not entered by agreement.

(1) Rex *v.* Justices of Devonshire; Cald. 32. 2 Bott, 718. Pl. 800. As to how far the entry is affected by a neglect to give reasonable notice, see post, sect. 5.

should

should not be heard, but that it should be governed by the determination of the sessions as to the father's settlement. That accordingly admissions in writing were entered into by both parishes to that effect; and that the attorney for W. desired that the appeal against the order for the son's removal might not be entered, to save expence. That N. B. parish, relying on the faith of such admission, only caused an appeal against the order for removing the father to be entered. And such appeal was accordingly tried, and the order quashed. That soon after the sessions, the parish officers of W. in breach of their agreement, sent the son and his family to N. B. who gave fresh notice of appeal to W. and also served the parish officers with notice to appear at the next sessions, to shew cause why the admission before entered into by their attorney should not be confirmed. That N. B. appeared at the next session, on the 1st April, and moved to enter and try the appeal, when the court of quarter sessions refused to interfere, alledging that it was not their practice to receive any appeal, if not entered at the sessions immediately following the order of removal; and that they could not notice any private agreement by the parties. The affidavits against the rule admitted the notices of appeal against both orders, and the subsequent agreement to let the son's settlement depend on that of the father, in order to save expence; but stated, that at the conference between the two attornies, N. B. acknowledged that the father was once settled with them, by service under indentures of apprenticeship, and the only question was, whether he had gained a subsequent settlement by purchase in W. But that upon the trial of the appeal, N. B. refused to admit the indentures of apprenticeship, and consequently the merits of his appeal were not entered into: on which account W. parish refused to admit the son's settlement. On shewing cause against the rule it was insisted, that it appeared from the correspon-

dence

dence between the parties (1), &c. that requiring proof of the indentures at the sessions was a departure from the agreement between parishes: the real object of dispute being only as to the subsequent settlement in W. which alone W. came prepared to disprove. That N. B. having taken this undue advantage at the sessions, W. ought not to be bound by the event of an appeal which was not decided on the real merits of the question. But the court said, the application was a reasonable one, and they ought to grant it. The parish officers of N. B. were prepared to enter their appeal at the proper time, and were only prevented from doing so by the agreement of the other parish, which then rendered it unnecessary. No fault was imputable to them; the mandamus, therefore, should go to the justices, to receive and enter the appeal *nunc pro tunc*, and enter continuances. (2)

II. *Of the Remedy to compel the Justices, at Quarter Sessions, to receive and hear an Appeal.*

The remedy, as appears by the foregoing cases, is by mandamus, directed to the justices of the county, or corporate place, who have jurisdiction to try the appeal, commanding them to receive and hear it. (3) Remedy by mandamus, to compel sessions to enter and hear.

The first proceeding is by motion in the court of King's Bench, for a rule to shew cause why the writ should not issue. Form of moving for it. On notice.

(1) Certain letters were set out on the affidavits as well as various other circumstances.

(2) Rex v. Justices of Wiltshire, [illegible] 683.

(3) If the sessions refuse to receive an appeal against a rate, the court will grant a mandamus to compel them. Rex v. Overseers of Weedon, [illegible] 265 [illegible]

What necessary to warrant the motion.

This motion is grounded upon affidavits, stating such facts as are supposed to warrant the application to the superior court: one of which must be, that the sessions have been previously applied to, and refused to receive it.

The rule to be served on justices who refused at sessions, and on parties interested.

If a rule to show cause be granted, it is served upon some of the magistrates who have attended at the sessions (1): and also upon the parties who were made respondents by the intended appeal.

Practice in shewing cause against the rule.

Both, or either, may appear by counsel, on the day appointed in the rule. They shew cause either on the prosecutor's affidavits, or by affidavits of their own, stating facts to vary the case, or contradicting those which have been sworn to on the part of the prosecution. The court will not grant the rule, if the merits of the case are clearly against the party applying; and they have obliged him to pay the costs out of pocket, where misconduct appeared with respect to his affidavits. (2)

Costs.

If he succeeds in making the rule absolute, it is usual for the magistrates to receive and hear the appeal, without putting the prosecutor to sue out the writ. (3)

Form of entry at the sessions where made at a sessions after the next.

It is likewise necessary that the sessions should enter the appeal, as of the sessions, when it ought to have been presented, and continue their jurisdiction by fictitious entries of adjournment from that session until the sessions at which it is heard. (4)

(1) Usually the chairman and three justices who are placed nearest to him in the caption of the sessions.

(2) Rex v. Justices of Devonshire, Cald 34. ante, 411. (1).

(3) As to where the justices think proper to make a return to the mandamus, and the proceedings thereon, see ante, Vol i. 36.

(4) See Rex v. Justices of Buckinghamshire, 3 East, 342, Rex v. Yarpole, 4 Term Rep 71. Rex v. Polsted, 2 Str. 1262. Rex v. Justices of Wiltshire, ante, 407.

SECT.

SECT. V.

Of Notice of Appeal.

In appeals, no process is issued by the court to compel the respondent's appearance. A notice by the appellant is given in lieu thereof, which, if it be duly served upon the former, and he neglects to appear, the court, upon proof thereof, will proceed to hear and determine the case, notwithstanding his absence. Notice of appeal, therefore, operates not only in the nature of process, but likewise resembles the declaration in a civil action, or the indictment in a criminal proceeding. It contains a statement of the party's complaint, to the proof of which he is confined at the hearing of his appeal. In most cases therefore it should be so framed, as not only to enable the opposite party to understand what it is that he must come in and defend, but also to let the appellant into proof of all such points as he thinks material to his case (1). But when it is made against an order of removal, nothing more is necessary than to describe with sufficient certainty the order or orders which are the subject of the appeal.

A notice supplies the use of process.

And is a statement of the appellant's complaint.

It must contain

A notice is regulated partly by statute, and partly by the custom and practice of the session before which the appeal is made. It may be considered under the following heads: 1st, How far it is regulated by statute, and whether the right of entering an appeal is affected thereby. 2d, Of its form. 3d, The time and manner of service, and upon whom it is to be served. 4th, The effect of notice upon the hearing of the appeal.

How regulated in form

(1) See post. 421, &c.

1st. As

1st, Statutes affecting it, &c.

1st. As to the statutes, and how far the right of entering an appeal is affected by a neglect of giving notice.

The notice of appeal against poor-rates, and overseers' accounts, is regulated by 17 Geo. II. c. 38. s. 4. and 41 Geo. III. c. 23. (1); 50 Geo. III. c. 4 that against orders of removal by 9 Geo. I. c. 7. s. 8, and 35 Geo. III. c. 101. sect. 2.

17 Geo. II. c. 38. appeal against rates on giving reasonable notice.

The 17 Geo. II. c. 38. makes it lawful for any person aggrieved, "*giving reasonable notice* to the churchwardens," &c. to appeal "to the next general or quarter sessions, who are hereby authorized and required to receive such appeal, and to hear and finally to determine the same; but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same." (2)

9 Geo. I. c. 7. against removals not proceeded on unless reasonable notice given.

The 9 Geo. I. c. 7. provides, that no appeal from any order of removal *shall be proceeded upon* in any court of quarter sessions, *unless* reasonable notice be given by the churchwardens or overseers of the poor of the parish or place, who shall make such appeal to the overseers of the parish or place from which such poor person or persons shall be removeable; the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions to which the appeal is made; and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same.

(1) This act respects the form of the notice, and is to be considered under that head.

(2) See ante, 416.

These

These acts vary from each other in phraseology. The first point that occurs is, whether the appellant is bound to give any, and what, notice previous to lodging his appeal against a poor rate (1). And it seems, from the words of the statute, from analogy to the case of removals, and also from the authority which is to be found upon the subject, that he is under no obligation to do so; but that if he gives reasonable notice before the appeal is heard, that is sufficient. And the justices are the sole judges whether the notice given is reasonable or not. (2)

No determination as to notice respecting poor rate.

(1) The 41 Geo. III. c. 23. s. 4. regulates the form of the notice, but is silent as to the time when it is to be given.

(2) On a motion to quash two orders made by the justices of peace of Berkshire at their quarter sessions, on an appeal against the poor's rate; one objection was, that it appeared that notice of the appeal was not given till the day before the sessions began, whereas there should have been eight days' notice by the practice of the sessions: that the justices, with a view, perhaps, to supply the defect of notice, adjourned the appeal by the first of their orders to the next day, and directed the overseers to attend them then with the rate; that, on the next day, accordingly, they went on to hear and made the second order on the merits, whereas they ought, as was insisted, wherever there was not proper notice, to adjourn the appeal to the next sessions. Sir Richard Lloyd, in shewing cause against the rule, as to the first objection observed, that the stat. 17 Geo. II. c. 38. 4. makes the justices sole judges of what notice is reasonable, and they had thought this so; besides, this notice was the best that could be given from the nature of the case, the rate being made on Saturday, and published on Sunday; notice of appeal was given on Monday, and on Tuesday the sessions was held. Per Wright, J. To these orders several objections have been taken: First, That, by the first order, the justices appear to be convinced that proper notice of the appeal had not been given, yet, instead of adjourning the consideration of it to the next sessions, as the act directs, where there shall not be sufficient notice, they take upon themselves to direct a notice, and adjourn to the next day only. This is the objection; but in answer it is said, the notice directed is only to attend with the rate; the notice of appeal they adjudged sufficient; and the adjourned day was not another but the same sessions. Denison, J. My brother has sufficiently answered the first objection. Forster, J. seems also to have concurred. But these orders were quashed on another exception. Rex v. Justices of Berkshire, 3 Glanvile on Elect. 132. 1 Const. 274 Pl. 288. See also Rex v. Justices of North Riding of Yorkshire, post. 479

In removals justices must adjourn appeal though insufficient, or no notice given.

But it has been decided in several cases of appeal against orders of removal, that where notice is not given in reasonable time before the next sessions, the justices are bound to receive and adjourn the appeal; as also where none has been given.

Insufficient notice served on Sunday.

Thus, upon a removal of a pauper, notice of appeal to the quarter sessions was served on Sunday; for had the appellants deferred the service till another day, they would not, according to the practice of the court, have been in time to give reasonable notice to the respondents, for the purpose of trying the merits of the appeal. The court of quarter sessions being of opinion, that the party aggrieved was not at any rate or for any purpose entitled to appeal, unless the prescribed notice had been previously given to the respondents; and also, that service of notice upon Sunday not being legal service, there had not, in point of law, been any notice, refused to hear, adjourn, or enter the appeal. But the court of King's Bench granted a mandamus, directing them to receive and hear the appeal, no cause being shewn against it. (1)

Mandamus after application to justices and examination, where no notice given.

Also where, upon similar application, it appeared on the affidavits on which the rule was obtained, that the examination was in August, and the order of removal was dated the 12th of November following (2); and the sessions, where the appeal was tendered, was held on the 12th of January in the ensuing year; *that no notice of appeal had been served,* (for which the reason assigned was, that the appellants had not been able to get their witnesses ready, till it was too late to give such notice,)

(1) Rex v. Huntingdonshire, Cald. 28.

(2) The date of the removal does not appear, but the January sessions was the next sessions after the date of the order.

that the court *had been moved to receive the appeal, and adjourn the consideration of it*, till the following sessions, and that they had refused to do it. The court were clearly of opinion that the justices ought to have received the appeal, and the rule was made absolute (1)

Mandamus after motion to lodge and respite refused [illegible]

But on a similar application, where the order of removal was made on the 26th November, and executed on the 28th, it appeared that the appellant attended the next quarter sessions, held on the 13th of January, and moved the court *for leave to lodge the appeal, and to respite the hearing thereof*, to the then next quarter sessions. The following entry was made by the quarter sessions: "For as much as it appears to this court, that there has been sufficient time, since the removal of the pauper, for the appellants to give notice, and come prepared to try this appeal at this sessions, and no cause is shewn why they did not proceed accordingly, it is ordered that the notice *for lodging the same, and respiting the hearing to the next quarter sessions, be rejected.*" The court were of opinion that the justices had not acted wrong: for the motion was in effect to adjourn the appeal; and it was evidently the intention of the parties *not to enter the appeal unless the court would adjourn it.* The justices are to judge of the reasonableness of the time, and in some counties they establish a rule regulating the time of notice. Here it appears, that the order of removal was executed on the 28th of November, so that there was sufficient time for the appellants to give notice, and to come prepared to try it; and the justices, who are to judge of this, thought so. (2)

(1) Rex *v.* Justices of Gloucestershire, Doug. 191. 2 Bott, 711. Pl. 785.

(2) Rex *v.* Justices of North Riding of Yorkshire, 2 Term. Rep. 150. But see Rex *v.* Justices of Gloucestershire, ante, (1), where the motion was likewise to lodge and respite.

Where respondents at the trial object to the reasonableness of the notice, the sessions must adjourn the appeal.

Yet where an appeal against an order of removal, being lodged at the next sessions, came on then to be heard, and the parish removing objected to the notice, as not being reasonable according to the practice of the court, the sessions being of that opinion dismissed the appeal, although the appellant's counsel had moved to adjourn it agreeably to 9 Geo. I. c. 7. s. 8. But the court of King's Bench, on a motion for a mandamus to enter a continuance until the ensuing sessions, and then to hear and determine the appeal, were of opinion that the justices had done wrong, and were bound to adjourn it.

For *per* Lawrence, J. (1)—"There can be no doubt about the construction of this act." (9 Geo. I. c. 7. s. 8.) Before the stat. 9 Geo. I. it was supposed that if a parish, to which a removal was made, appealed to the next sessions after the order of removal was served upon it, the sessions were bound to hear and determine the appeal, although the removing parish had not had sufficient time to prepare itself: to remedy which that act was passed, which directs that no appeal from any order of removal shall be proceeded upon, unless reasonable notice be given, of which the justices in sessions are to judge. That is, they are to judge whether such reasonable notice has or has not been given, *as will entitle either party to proceed upon the appeal*; but the act goes on expressly to direct, that if it shall appear to the justices, *that reasonable notice was not given, then they shall adjourn the appeal to the next quarter sessions.* Now here the sessions have determined that reasonable notice was not given; nothwithstanding which, instead of adjourning the hearing of the appeal, as required by the act, they have, against the po-

(1) The only judge in court.

sitive

sitive direction of it, dismissed the appeal. There is no ground for supporting their determination. (1)

An appeal was lodged at the next sessions after an order of removal made, and was moved to be adjourned on the part of the appellants, no notice having been given to the respondents; but the sessions being of opinion that there had been sufficient time for the appellants to have given such notice after the order had been executed, and before the holding of the sessions, dismissed the appeal. A rule being obtained, calling upon the defendants to shew cause why a mandamus should not issue to them, commanding them to receive and enter a continuance on the said appeal to the next general quarter sessions, and there to hear and determine the matter of the said appeal, it was made absolute, without opposition.—Lord Ellenborough, C. J. The opinion delivered in the case of the King *v.* the Justices of Buckinghamshire, had been well considered; and the court were satisfied that the statute was compulsory on the sessions, in these cases, to receive and adjourn the appeal. (2)

2d, Of the form of the notice.

The form of notice in appeals against poor rates, and the accounts of churchwardens and overseers, is principally regulated by 41 Geo. III. c. 23, which enacts, sect. 4. that all notices of appeal against or from any rate for the relief of the poor, or against or from any accounts

Notice of appeals against rates, and overseers' accounts, regulated by 41 Geo. III. c. 23. § 4.

(1) Rex *v.* Justices of Buckinghamshire, 3 East, 342. See also Anon. Fol. 261. Rex *v.* Justices of Leicestershire, ante, 399. S. P.

(2) Rex *v.* Justices of Shropshire, called by mistake Staffordshire, 7 East, 549.; and as materially connected with this subject, see the cases as to what sessions shall be considered the *next*, to which the appeal must be made, ante, 402.

In writing, and signed by appellants or their attornies.

of the churchwardens and overseers, shall be in writing, and shall be signed by the person or persons giving the same, or his, her, or their attorney in their behalf; and such notices shall be delivered, or left at the place of abode of the churchwardens and overseers, or any two of them; and the particular causes or grounds of appeal shall be stated and specified in such notice; and upon the hearing, the sessions shall not inquire into any other causes, or grounds of appeal, than are specified therein.

By sect. 5. Objections not in notice may be heard by consent.

But it is provided by sect. 5. that with the consent of the overseers, signified by them or their attorney in open court, and with the consent of any other person interested therein, the sessions may proceed to hear the appeal, although no notice has been given; and with like consent they may hear grounds of appeal, not stated or mistated, in such notice, where it shall be given.

All objections, whether they render the rate liable to be quashed, or entitle the party to special relief by amendment, are grounds of appeal to the quarter sessions. They have been fully detailed in speaking of the rate itself, and are principally,

Objections to be stated in notice of appeal against a poor's rate.

1st, That the rate has not been made by the proper persons (1); 2d, nor for a proper place (2); 3d, nor duly allowed (3); 4th, nor properly published (4); 5th, that the principle of the rate is altogether defective, either from the mode of making it, or from particular classes of property being wrongfully assessed (5); 6th, or improperly omitted (6); 7th, that the general pro-

(1) Ante, Vol. i. 57.
(2) Ib. 38.
(3) Ib. 57.
(4) Ib. 59.
(5) Ib. 132. Rex v. Hill, ib. 144. Rex v. Road, ib. 145.
(6) Rex v. Guardians of the Poor of Canterbury, 4 Burr. 2290. Rex v. Justices of Berkshire, 3 Doug. on Elect. 132. Rex v. Whitney, ante, Vol. i. 144.

portion

portion of assessment is defective and unequal (1). 8th, that the appellant is over-rated for property which he does occupy (2); 9th, rated for property which he does not occupy (3); 10th, for property which, though occupied, is not a subject matter of rate (4); 11th, that persons specified are under-rated (5); 12th, or rated for property for which they ought not to be assessed (6); 13th, that occupiers or persons of sufficient ability are omitted (7); 14th, that some purposes for which the rate is made are not warranted by law (8); 15th, that it is made for a longer time than is necessary; for no man ought to be put to inconvenience by having a larger sum taken out of his pocket at once, than the exigencies of the parish reasonably require (9); 16th, that it is defective in point of form; 17th, want of jurisdiction in the sessions to try it. (10)

As many of these causes of appeal should be included in the notice as the appellant has fair and reasonable expectation of being able to sustain at the hearing.

Objections distinctly set forth, must specify names of persons omitted.

The grounds of objection must be set forth with sufficient clearness and precision, to enable the parish officers to come prepared to meet that case which the appellant meditates to make good against them; and he cannot enter upon those which are not so stated, without the consent required by 41 Geo. III. chap. 23. Thus, if an

(1) Rex v. Sandwich, &c Vol. i. 208.

(2) Rex v. Cheshunt, 2 Term Rep. 623, &c.

(3) Ante, Vol. i. 147. et seq.

(4) Rex v. White, ib. 144. n. (4), &c.

(5) Rex v. Mast, ante, Vol. i. 176. &c.

(6) See 17 Geo. II. c. 38. sect. 4. 41 Geo. III. c. 23. sect. 6. ante, 385.

(7) Ante, 422. (5).

(8) Rex v. Mickleficld, Cald. 2?7. ante, Vol i. 63.

(9) Rex v. Maddern, 1 Term Rep. 625. Durrant v. Boys, 6 Term Rep. 580.

(10) Lowther v. Lord Radnor, 8 East, 113.

objection be, that particular persons are omitted in the rate, their names should be specified in the notice. (1)

Several may join in a notice.

It seems also, from the express words of 41 Geo. III. c. 23. that more persons than one may join in giving their notice, where they have joined in preferring their appeal. (2)

Form of notice on appeals against removals.

The form of notices in the case of appeals, against orders of removal, is not so complicated. The 9 Geo. I. c. 7. s. 8. requires, that it shall be given by the churchwardens and overseers of the parish or place, who shall make the appeal to the churchwardens or overseers of the poor of the parish or place from which the paupers have been removed. It ought, therefore, to be addressed to the churchwardens and overseers of the parish from which the removal is made. It must be signed by the parish officers of the appellant parish, or, as is most usual, by their attorney (3); and if it be signed by or on behalf of a majority, it is sufficient (4). It is safe and usual likewise, although perhaps not altogether necessary, to date it (5); and all that seems required is, that

Signing.

Date.

(1) Rex *v.* Justices of Berkshire, 3 Glenb. on Elect. 13.. 1 Bott, 267. Pl. 261.

(2) See Rex *v.* Justices of Sussex, 15 East, 206. ante, 397.

(3) See Jory *v.* Orchard, that a demand [or notice] signed by the plaintiff's attorney for him, is a demand signed by the plaintiff. 2 Bos. and Pull. 39.

(4) The 8 sect. 9 Geo. I. c. 7. speaking of the time of notice to be given of appeals from orders of removal says, " that no appeal shall be proceeded on, unless reasonable notice be given by the churchwardens and overseers of the parish appealing, unto the churchwardens and overseers of the other parish." But it never was imagined that a notice, given only by three churchwardens, was insufficient; the contrary opinion has always been held. Per Buller, J. Rex *v.* Beeston, 3 Term Rep. 592.

(5) The 9 Geo. I. c. 7. s. 8. is silent as to whether the notice must be in writing. But perhaps the justices would, in conformity to general practice, consider this, as being necessary in order to render it " a reasonable notice," within the statute.

It

it describe the orders complained against with sufficient certainty.

3. Of the time and manner of service, and upon whom it is to be served.

Ten days' notice for appeals against fines.

By 33 Geo. III. c. 55. persons aggrieved by a fine may appeal to the next general or quarter sessions of the county where they reside, of which appeal ten days' notice, at the least, shall be given.

Reasonable time of notice depends on practice of the sessions

The legislature, with this and a few more exceptions (1), have left it to the sessions to determine, what is a reasonable notice. This depends upon the general usage and practice of the particular court into which the appeal is brought, and no general rule can be laid down respecting it (2). But it may be learned at the office of the

(1) Such as 42 Geo. III. c. 46. sect. 7. relative to the binding of parish apprentices, which requires that ten days' notice of appeal shall be given by the party aggrieved by any thing done in pursuance of that act. 49 Geo. III. c. 68. sect. 5. and 7 requires that no appeal in any case relating to bastardy shall be brought, received, or heard at the quarter sessions, unless ten clear days' notice before the sessions at which the appeal shall be made of the parties' intention to bring such appeal, shall be given to the justices making the order, or one of them, and a recognizance entered into, within three days after the notice to try the appeal, abide the judgments, and pay such costs as shall be awarded.

50 Geo. III. c. 40. which gives an appeal to parish officers against an order, reducing items in their accounts, makes it necessary to enter into a recognizance in certain terms, (ante, 367.) to found the right of appeal, but it makes no provision as to the time or manner of serving notice.

(2) In the court of quarter sessions for the county of Surrey, the practice requires service of notice eight clear days previous to the first day of the sessions, in appeals against rates; and six clear days in an appeal against an order of removal; that is, supposing the sessions to commence on Tuesday, service on the week preceding is required in an appeal against a poor rate; and on the Tuesday se'ennight in an appeal against a removal; Sunday counting as one of the running days in both cases, in analogy to the rules respecting service of notice in the superior courts. At the Buckinghamshire sessions appeals against removals require eight days, one inclusive (i. e. the day of service), the other exclusive (i. e. the first day of the sessions). See Rex v. Buckinghamshire, 5 East, 342.

the clerk of the peace for the sessions, which entertains the appeal.

Notices, how many to be made.

The agent for the appellant must make as many duplicates of his notice of appeal as there are persons to be served, and must likewise retain one in his own possession. The person who serves these notices should compare all which he serves with that remaining in his or in the attorney's hands, that he may be enabled to swear to the service, in case the parties neglect to appear at the sessions, or refuse to admit notice; for, although a respondent be present by himself or his counsel, together with his witnesses, he is not in point of law supposed to be so, unless he has been regularly served with notice, which must appear either from his own admission or by other proof.

Against rates signed by parties, or their attorney. Against rates, a copy sufficient.

In appeals against rates, an original notice, that is, one signed by the party or parties, or his or their attorney, must be served upon those who are to be made respondents by the appeal (1). A similar notice in appeals against removals will be good, but service of a copy seems sufficient.

Service of a duplicate original.

Where the duplicate original is served, there is no necessity of proving notice to the parties who have been served to produce the original which was served upon them, in order to enable the appellant to read that which he retains (2). Also, where service of a copy is sufficient.

Service of a copy.

it seems unnecessary to serve notice to produce the copy served, in order to let in the party to prove the paper re-

(1) This is required by 41 Geo. III. c. 23. s. 4.

(2) See Jory v. Orchard, 2 Bos. and Pull. 39. Rook, J. dissent. Sutees et al. v. Hubbard, S P, Per Lord Ellenborough, C. J. 4 Espin. Ni. Pri. Cas. 203.

tained;

tained; for it is said to be established practice, that no notice need be given to produce a notice. (1)

The day on which it is served must be proved, in order to shew that it was in time; and if served on Sunday, it seems bad. (2) Service on particular day to be proved.

As to the manner of service, the 41 Geo. III. c. 23. s. 4. directs, that it is to be either by delivery to the parish officers and persons interested, or leaving it at their places of abode. In rate service by leaving at the house sufficient.

The like service is good, where the appeal is against an order of removal (3); but if the parish has some known agent for this business, it is usually served by consent upon him. So, in order of removal.

With respect to what persons are to be served, 41 Geo. III. c. 23. provides, that service upon any two of the churchwardens and overseers shall be sufficient, in the case of rates and overseers' accounts (4); and it In rates and removals, service on two parish officers sufficient.

(1) Per Bower arguend. in Shaw and others v. Markham, Peake's Ni. Pri. Cas. 165. Such notice may be subjoined at the foot of the notice of appeal, if the attorney has doubts.

(2) Rex v. Justices of Huntingdonshire, Cald. 283. ante, 418. (1). Yet see ante, Vol. i. 51.

(3) "In every case of the service of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So where the legislature has enacted, that before a party shall be affected by any act, notice shall be given him, leaving that notice at his house is sufficient. In general, the difference is between process to bring the party into contempt, and a notice of this kind, (i. e. to a tenant to quit,) the former of which only need be personally served." Per Lord Kenyon, C. J. Jones, ex dem. Griffiths v. Marsh, 4 Term Rep. 464.

(4) In appeals against overseers' accounts, this statute has not distinguished whether the prescribed notice must be served on the overseers against whose accounts the appeal is made, or on those who are in office at the time when it is made.

would

would be equally good in an appeal against an order of removal. (1)

What notice sufficient, prior to 41 Geo III. c. 23.

Prior to 41 Geo. III. an appeal against a poor's rate was considered in the nature of a suit between the appellants and the parish represented by their officers, and no other persons were made parties thereto.

The 17 Geo. II. c. 38. required reasonable notice of appeal to be given to the churchwardens or overseers, but was silent as to other persons; and the nature of the case did not require that it should be given to them, as they could not be affected by the judgment, otherwise than in common with the remainder of the parish. (2)

By 41 Geo III notice to be given to all persons whose rate is made a ground of appeal.

But 41 Geo. III. having given power to the justices to alter and amend a rate, with respect to the assessment of persons whose assessments are made grounds of appeal by other inhabitants, the principles of justice required that notice should be given to them that they might defend their interests, if inclined to do so. It is accordingly enacted by sect. 6. That persons appealing against a rate for the relief of the poor, because any other person is rated or omitted to be rated therein, or because any person is rated at any greater or less sum than they ought to be rated therein, or, for any other cause that may require any alteration made with respect to any other person than the person so appealing, shall also give notice to the other person or persons so interested in the event of the appeal; and such persons shall, if they desire it, be heard upon the appeal.

(1) There seems no reason why service on a single parish officer should not be sufficient, unless it can be impeached as fraudulent or collusive. But see ante, 424.

(2) Rex v. Maddern, 1 Term Rep. 625 Rex v. Churchwardens of Andover, Cowp. 558. Appeals against rates.

It

It is not decided whether the persons, to whom such notice has been given, are in any degree, or how far, concluded by the judgment of sessions upon the rate, where they neglect to appear for their interests, after such notice that their assessment has been made a ground of appeal. (1)

Quære, whether one having notice, and not appearing, is concluded by any alteration in the rate?

4th, As

(1) The following case has been determined, involving, to a certain degree, the question of, How far it is unnecessary for the appellant, objecting to a rate, because certain persons are not therein rated, to serve such persons with notice, in order to enable the sessions to quash a rate?

D. Jones appealed to the quarter sessions of Glamorganshire, against a poor rate made for the parish of Aberavon in that county, and the sessions quashed the rate, subject to the opinion of this court, on the following case:

The parish, town, and borough of Aberavon, in the county of Glamorgan, are co-extensive, and have churchwardens and overseers appointed in the common way. The portreeve, aldermen, and burgesses, some of which latter reside in the borough and parish, some in the neighbourhood, and others at a distance, are seized in fee in their corporate capacity of certain inclosed lands, to the amount of —— acres; and they are also in like manner seised of two or three hundred acres of uninclosed marsh lands, called Aberavon marsh, worth 10s. an acre, and of about one hundred acres of mountain, worth 5s. an acre. The inclosed land is annually parcelled out between the resident burgesses, who occupy the same as tenants, paying to the corporation certain rents according to the size and value. These inclosed lands are charged in the rate to the burgesses, the renters, as occupiers, in proportion to their several rents; and as such, those burgesses pay the poor rates, and also the land-tax, to which the inclosed lands are also rated. In the poor rate the inclosed lands are charged under the title of "*The Burgesses' land*," which covers the three columns in the other part of the rate reserved for *landlords, tenants, and occupiers*, adding the person's name from whom the rate is collected, and the valuation of his occupation, and the sum to be collected. The corporation have not any live stock by which they can occupy; nor any personal chattels, except their maces and halberts. The uninclosed marsh and mountain have never been charged to either land-tax or poor rate. They are occupied as common land by the individual burgesses, or their widows, who are residents, and keep stock to occupy; but those burgesses who have not any stock, or are non-resident, do not receive any benefit from the same. The burgesses do not permit any persons but burgesses

4th, As to the effect of notice on the hearing of the appeal.

It

or their widows, to claim a right of pasturage on the uninclosed lands; but they suffer some poor persons, by way of charity, and in ease of the parish, who are residents, not being burgesses, to depasture there. Of these who depasture, every person occupies according to the quantity of his stock, so that one occupier may have eighteen head of cattle and an hundred sheep, there being no limitation; and another, not more than one cow, or one horse, or even one sheep. In the poor rate in question, the uninclosed marsh and mountain lands are as usual left out, and D. Jones gave notice of appeal against the rate to the churchwardens and overseers of the poor of the parish, and also to the portreeve, aldermen, and burgesses of the town and borough of Aberavon, stating, as the grounds of objection, that they had omitted to rate the marsh and mountain lands called Aberavon marshes and Aberavon mountain, all which said premises were in the possession or occupation of the said portreeve, aldermen, and burgesses. This notice was admitted to be well served on the churchwardens and overseers of the poor, and on the portreeve, aldermen, and two of the principal burgesses in their corporate capacity; but the majority of the resident burgesses, and other persons who were occupiers of the said uninclosed lands, were not served; and a number of out-dwelling burgesses, within the county and jurisdiction of the court, were not served.

On the hearing of the appeal, the questions before the court were, 1st, Whether these uninclosed lands should, under the circumstances of the occupation, be rated at all? 2d, Whether, if they were rateable, the portreeve, aldermen, and burgesses, were to be considered as occupiers, and to be rated as such, and notice of appeal to them in their corporate capacity to be deemed sufficient? or, whether the several or respective burgesses, and other persons who were the actual occupiers, were not the persons to be rated, and that in proportion to their respective stocks? and if such persons were to be rated, whether the court could quash or amend the rate, without such persons first having notice under the stat. of the 41 Geo. III. c. 23. s. 6. which they had not?

It was contended by the counsel against the order, that the stat. 41 Geo. III c. 23. s. 6. is peremptory, that any appellant objecting to a rate on account of the omission of any person, shall give notice to the party interested, as well as to the parish officers, in order to enable such party to come and defend his interest; and the appellant is not entitled to be heard without proving such notice. Then every such appellant is bound to know who the persons are,

the

It has been already observed, that a notice of appeal operates in the nature of process, to bring the respondent party

Where respondents do not appear, notice

the omission of whom in the rate he complains of, and if he cannot give reasonable evidence to satisfy the sessions that such party ought to have been included his appeal must be dismissed It is not enough to shew that some other person is omitted, to whom he has not given the notice required by the act, because if that person was before the court, he might be able to satisfy it, that the omission was proper; and therefore, in a doubtful case, the notice required would be purposely withholden, in order the more easily to procure the rate to be quashed upon *ex parte* evidence. But upon the case stated, so far from its being shewn, that the corporation were the occupiers of the common land their occupation is negatived, for it is stated that they had no stock wherewith to occupy it, and an actual occupation is shewn by others, to whom there was no notice to defend as required by the statute. It is not enough to shew that property yielding profit is omitted in a rate, without shewing some beneficial occupier who is liable to be rated for it; as in the case of St. Luke's hospital (1) The poor's rate is not a tax upon property, but upon persons in respect of property And the law does not look to the title but to the actual beneficial occupation The several burgesses then who turned upon the common have an individual beneficial occupation of it, distinct from any corporate character though such benefit may be derived to them through that title, in like manner as the officers of an hospital, who have an individual benefit derived to them from their occupation of certain rooms, are rateable in respect of that beneficial occupation (2). The circumstance of their occupying without payment of rent, only proves their occupation to be more beneficial Besides, in order to apply the occupation of individual members of the corporation to the corporation itself all the members ought to enjoy the same privilege, whereas this is confined to the resident members Then again, the occupation of the widows of corporators can only be applied to an individual occupation, and the circumstances of other persons being permitted to occupy out of charity (3), does not render them less liable to be taxed, in respect of the property which they so enjoy.

(1) 2 Burn, 105 ; ante, Vol. 1. 152.

(2) Ib. 153, (1), and Rex *v.* Terrot, 3 East, 506

(3) Ib. 160 et seq

Tried

must be proved

party into court. Unless he appears, therefore, and admit notice, the appellant must either prove actual service, or an acknowledgment from him that it has been received. This is a preliminary step before the court will enter into the subject matter of his complaint.*

Appeal struck out if neither

An appellant may countermand his notice at any time before the sessions (1); and if an appeal be entered, and

Lord Ellenborough, C. J.—The case is very loosely and inaccurately drawn. We ought to have the right of enjoyment more distinctly stated. It does not appear whether the burgesses who turned stock on the common did so in right of their franchise, or by permission of the corporate body. I own I have great difficulty in deciding, that a person who has a mere permission to turn his cattle on another's land is rateable as an occupier.

Grose, J.—The questions put at the end of the case might be very proper to be considered by the sessions, but that is not the proper form of drawing up a case for the opinion of this court. We can only say whether the sessions have done legally in quashing the rate.

The Court then seemed inclined to send the case back to the sessions to be restated, but after some further consultation on the bench,

Lord Ellenborough, C. J. said: On further consideration, I think we may deal with the case as it is. Here is a large tract of property producing profit, which is liable to be rated, and no person is in fact rated for it, this property is stated to belong to the corporation, and it may be doubtful whether the occupation shewn be their occupation or that of individuals. Under these circumstances, I cannot say that the sessions have done wrong in quashing the rate. The rate, therefore is quashed, because no person has been rated for property which ought to have been rated, and the order of sessions was confirmed. (1)

(1) If this be done in the case of orders of removal, within the time, allowed by the practice of sessions, the court will not give costs under 8 & 9 W. III. c. 30. In the case of rates, it may be done at any time, as the justices have no power to award costs, see 433. n. (1).

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(1) Rex v. The Inhabitants of Aberavon, Mich. 45 Geo. III. 5 East, 453.

when called on neither party appear, it is struck out of the list, without any judgment given.

party [illegible]

If the appellant appear and prove notice, and the respondent is absent, the court may proceed to hear and determine the appeal *ex parte*.

If appellant [illegible] not, [illegible] on proving notice

If the respondent appear, and the appellant deserts his appeal, it is of no consequence in the case of a rate, for the court have no power to award costs in that event, under 17 Geo. II. c. 38. The hearing and determination of the appeal is, by that act, made a condition precedent to their power to give them; the words being. "may award to the party for whom the appeal shall be determined, his costs, &c." (1)

[illegible] not [illegible] entitled to costs.

But in the case of appeals against orders of removal, the respondent may appear and move to have his costs, under 8 and 9 W. III. c. 30. (2)

But [illegible] respondents [illegible] have order confirmed, and costs.

It seems, however, as if he cannot have the original order confirmed. The parish of B. *gave notice to appeal* against an order of removal from that of R. upon which R. took the pauper back, but got their order confirmed at sessions. The court of King's Bench quashed the order of confirmation, as not being made on any appeal, and consequently without jurisdiction. (3)

(1) Rex *v.* Justices of Essex, 8 Term Rep. 583.

(2) It is unnecessary, if not illegal, to move for a confirmation of the original order, to obtain costs under the statute; and at the Surrey sessions, in drawing up such an order for costs, it is not stated that the original order is confirmed. See post. (3)

(3) Road *v.* North Bradley, 2 Str 1168. Rex *v.* Levington, Burr. S. C. 278. Godalming and St. Michael's, Winchester, Third note, S. P. But quære if the court are not put in possession of the appeal, for the purpose of being enabled to confirm the original order by its being lodged with the clerk of the peace, especially if after being so entered, the appeal is respited to the following sessions.

If

If parties appear, [illegible] sessions must adjourn the appeal [illegible] adjournment.

If the parties appear, and the notice is objected to, as not being reasonable notice in point of time, within the statute, as explained by the practice of the court, it has been already seen, that where this happens at the next sessions after the removal at which the appeal is lodged, the justices are bound to respite to the ensuing sessions. (1)

But if [illegible] notice [illegible], may dismiss the appeal.

But where an appeal is lodged at the next, and respited to the ensuing sessions, the court may dismiss it, unless sufficient notice has been given for the hearing at that sessions, according to its practice. For, although it seems decided, that giving notice is not a condition precedent to entering an appeal, under 17 Geo. III. c. 38. s. 4. and 9 Geo. I. c. 7. s. 8. (2), yet it appears essential to the final hearing and adjudication, unless the objection is waved.

Appeal dismissed for insufficient notice previous to 9 Geo. I. c. 7.

Thus, where there was a mandamus to the sessions to proceed on an appeal, they [*i. e.* the justices] returned, that the appeal was dismissed for want of six days notice, which, by a former order, they had appointed to be given of every appeal. The court allowed the return; for they are the properest judges of a point of practice at the sessions, and all courts must have stated rules to go by. (3)

Application of this case.

Although this case is prior to these statutes, it seems to shew the necessity of giving sufficient notice, previous to the second sessions. For the foregoing acts merely enable the justices to adjourn appeals to the sessions after entry. They expressly recognize the necessity of a notice, and refer it to the justices to determine, what notice shall

(1) Rex *v.* Justices of Leicestershire, ante, 250. Rex *v.* Justices of Buckinghamshire, ante, 421. (1). and the other cases cited there.

(2) Ante, 417.

(3) Anon. Trin. 6 Geo. I. 1 Str. 315.

be

be reasonable to enable the parties to have the appeal heard at the original sessions; and the power of the court upon the subsequent hearing remains as it was antecedent to the statutes, and as it existed at the time of the foregoing decision. (1)

When an appeal is properly brought before the court, they must either adjourn the consideration, or proceed to hear and determine it.

SECT. VI.

Of adjourning Appeals.

Adjournment under 9 Geo. I. c. 7. & 17 Geo. II. c. 38, confined to cases where no reasonable notice.

THE usual reason for having appeals adjourned to the sessions ensuing that at which they are lodged, is on account of the insufficiency of notice. But an adjournment sometimes takes place under other circumstances, notwithstanding the words of 9 Geo. I. c. 7. and 17 Geo. II. c. 38., that the justices shall, after an adjournment to the next sessions, *for want of reasonable notice*, "then and there finally hear and determine the same."

Other cases of adjournment.

This construction seems established by express decision (2); and the practice of the court of King's Bench, in

(1) See the object of 9 Geo. I. c. 7. explained by Lawrence, J., Rex *v.* Justices of Buckinghamshire, ante, 434 (1).

(2) Rex *v.* Stansfield, Past, 16 Geo. II. An adjournment of an appeal against an order of removal. Burr. S. C. 205. An inclosure act gave the parties aggrieved a right of appeal to any quarter sessions to be holden for the county of W. "*within four calendar months after the cause of complaint shall have arisen*," and enacted "that the justices *at the said general quarter sessions* are hereby required to have and determine the matter of every such appeal," &c. Per Lord Ellenborough, C. J. "I hold without any doubt that the court who are to try the appeal have an undoubted authority to adjourn it when

in directing courts of quarter sessions to enter appeals, and continue them by fictitious adjournments, admits them to have the like power since these statutes which they possessed before. (1)

1 Adjournments by consent.

Appeals may, therefore, be adjourned by consent of parties (2), upon assigning, a sufficient reason to induce the court to allow it; such as the absence of material witnesses, beyond the reach of legal process to enforce their appearance; the pauper having run away; and the like.

By justices independent of parties. 1 For consideration.

The justices likewise possess a power, as inherent to their jurisdiction, to adjourn them at discretion. Thus they may well adjourn an appeal upon debate, for further consideration. (3)

2 If equally divided in opinion.

So they may adjourn it where the justices are equally divided in opinion; and it is said, that their being so divided is a sufficient warrant for the clerk of the peace to enter an adjournment, and that it is his duty so to do. (4)

To obtain a judge's opinion.

They may likewise adjourn it, for the purpose of submitting a question in the case to the judge of assize. (5)

when once properly lodged, if it be necessary for the advancement or convenience of justice; and the sessions are to judge of the proper occasion for doing so. But the act of the party himself, in preferring his appeal, must be within the limited time." Rex v. Justices of Wilts 13 East, 352.

(1) Rex v. Langley, 11 W. III. 1 Ld. Raym. 481. And as to the practice, see Rex v. Justices of Buckinghamshire, ante, 421. (1), and post.

(2) Consent of parties, given by themselves or their attornies, binds them in subjects of appeal, and prevents their setting aside in the superior court what has been done under it; See Rex v. Justices of Northampton, Cald 30. Rex v. Natland, Burr. S. C. 796.

(3) Rex v. Stansfield, ibid. (1.) Rex v. Langley, ante, (1).

(4) Bodmin v. Warlingen, 2 Bott, 726. Pl. 815.

(5) Rex v. Hedingham, Burr S.C. 112. Rex v. Justices of Westmorland, 2 Bott, 726. Pl. 816. Rex v. Natland, Burr. S. C. 793.

An

An adjournment of a sessions is not to be to a time beyond that fixed by 2 Hen. V. c. 4. for holding another original sessions (1); but they may respite an appeal to an adjournment of the same sessions, and determine it there. (2)

Adjournment must not be beyond time of next sessions. May adjourn appeal to an adjournment.

If there are not justices enough to hold a sessions, there are not enough to adjourn it legally; and every act done after such adjournment is void. (3)

There must be justices to hold a sessions to adjourn it.

Except an appeal, therefore, is properly adjourned, the ensuing sessions have no jurisdiction to hear and determine upon it (4); and if it does not appear, upon the caption of the order of sessions, to have been regularly respited, by continuance or adjournment, the court of King's Bench will quash the order of sessions as void. (5)

Unless appeal properly adjourned, the next sessions have no jurisdiction. B. R. will quash their order unless adjournment appears in the caption.

But as a neglect to enter the respite of an appeal, after it has been ordered, is an omission by the court or its officer, and no fault in the appellant, it seems hard if he is to be deprived of redress by an error in which he has no share.

Quære, whether B. R. will interfere when the sessions omit to enter the adjournment.

In an appeal from an order of removal, the justices were divided in opinion, and no adjournment took place, but an entry by the clerk of the peace, that the appeal

B. R. granted no redress when no adjournment made.

(1) Rex v. Glance, 2 Bott, 723. Pl. 807.

(2) Rex v. Stansfield, Burr. S. C. 205. ante, 436. (1). Case of appeal against an order of removal. Also Rex v. Justices of Berkshire, 3 Glanb. on Fleet 132. 1 Const. 274. Pl. 288. Appeal against a poor's rate.

(3) Rex v. Westrington, 2 Bott, 725. Pl. 814.

(4) Rex v. Hedingham, Sible, Burr. S. C. 112. Rex v. Polsted, 2 Str. 1262. Rex v. West Torrington. Burr. S. C. 203. Bodmin v. Warlingen, ante, 436. (4).

(5) Ut supra, n. (4). As to the necessity of entering continuances in the caption of the order, see post.

 was

was lodged, and nothing done upon it. One of the parishes gave fresh notice of appeal, when the justices proceeded in it, and quashed the order. The court of King's Bench declared, that " If the parties will not consent to quash both orders, we will consider whether we cannot send it down to have the entry of the first order amended." They afterwards quashed the order of sessions, because made without adjournment; but no opinion was given. (1)

But in another case, where a similar omission, they seemed inclined to grant a mandamus to enter and hear the appeal.

But in another case, where doubts arose on the hearing of an appeal at the Christmas sessions, and there was a reference to the opinion of the judges who should come the next Northern circuit. The judges came after the ensuing Midsummer sessions, but nothing further had been done at the Christmas sessions, *i. e.* the appeal was not adjourned. The parties producing different states of the case at the assizes, the judges did nothing. A mandamus was moved for to the justices, to proceed to hear and determine this appeal. The court inclined to grant the mandamus, if the justices would not proceed, but enlarged the rule for further consideration. (2)

Mandamus to hear where adjournment inadvertent.

Lastly, where an appeal against an order of removal was regularly lodged at the Michaelmas sessions, 1767, at Petworth, and the justices, upon hearing the cause, conceiving a doubt, ordered a special case to be made for the opinion of the court of King's Bench. The counsel withdrew in order to settle the case, but before they had come to any agreement, the sessions was inadvertently adjourned, and this cause was neither retained nor ended. Upon those facts an application was made to the court of King's

(1) Bodmin *v.* Warlingen, ante, 436, (4).

(2) Rex *v.* Justices of Westmoreland, 29 Geo. II. 2 Bott, 726. Pl. 816.

Bench

Bench for a madamus, to compel the justices to proceed in the appeal.—By the court. When the justices entertain a doubt, they may, without the consent of the parties, order a special case to be made. When the justices say, as they did here, that a special case shall be made, they virtually say, that the cause shall be adjourned over, till a new case is made; and therefore the want of an adjournment, or a respite, is merely the omission of the clerk, and may at any time be supplied. Let a mandamus go immediately, unless the respondents will consent to a case. (1)

SECT. VII.

Of hearing Appeals.

Practice of sessions.

THE form of proceeding upon the hearing of appeals, is regulated by the practice of each particular court of sessions. It usually differs but little in the case of orders of removal, or poor's rates.

Order of hearing appeals.

Appeals are heard in the order in which they are entered with the clerk of the peace, unless for some special reason submitted to the court. The first step in all cases, after an appeal is called on, is, that the appellant shall prove his notice, unless it is admitted.

Of producing the order and pauper.

Where the appeal is against an order of removal, the parish officers should produce the original order, if it has

(1) Rex *v.* Justices of Sussex, 2 Bott, 745 Pl. 833 But that a subsequent sessions have no power to grant a case if it has not been granted at the sessions which hears the appeal, see post. 449. (4) & 459. (1)

 been

been served upon them (1). They should also have the pauper present, if he has been delivered to them, or be able to shew that his absence is not through their fault or contrivance. (2)

In appeals against removals, respondent begins.

After these preliminary steps, the respondent's counsel begin to open his case (3), and establish the order of removal. (4)

So in appeals against rates, where cause of appeal, that appellant has no rateable property.

In an appeal against a poor's rate, if the ground of complaint be that the appellant has no rateable property in the parish, the counsel for the respondent begins in like manner to establish possession of some property in the appellant, for which he is liable to be rated, before the other side is called upon to refute it (5). The reason assigned for this rule by the judges is, that those who have done the act ought to show the propriety of it by evidence.

Practice as to hearing of ap-

But as the appellant, in all other instances, makes certain substantive objections to the rate by his notice, it is

(1) If only a copy of the order is served, the appellant should serve the removing parish with notice to produce the order at the hearing, and the justice to return that which is in his possession. Where the parish, by which the removal is made, wants to make use of the order in evidence, they should serve a notice to produce the original upon the officers of the parish removed to; and it is the safest way to serve it upon the pauper also, after which, a copy may be read at the hearing of the appeal, and the pauper, if he has made one, may prove it. Rex *v.* Kirkby Stephen, Burr. S. C. 664. See ante, Vol. 1. 310.

(2) It is usual to serve the appellants with notice to produce him. But quære whether it is not the safest practice to subpœna paupers as witnesses, where they are to be used as such?

(3) Per Lord Kenyon, C. J. Rex *v.* Newbury, 4 Term Rep. 475. 1 Bott, 288. Pl. 279.

(4) But different sessions vary in this part of their practice. Thus, at the Surrey sessions, if the respondent proves to the court's satisfaction, that the pauper cannot be found, the appellant begins, as he does likewise at the Gloucester sessions, if the order appear on the face of it to have been made on the oath of the party removed.

(5) Rex *v.* Newbury, ante, (3). See also Rex *v.* Topham, 12 East, 546.

the

the practice, in many counties (1), to call upon him to make them good, before the court obliges the respondents to defend their rate. Where the practice is so, the appellant's leading counsel opens the case by stating the causes of complaint; but he is obliged to confine himself to such as are sufficiently set forth in the notice, unless he obtains the consent of the other side to go beyond them.

peals against rates.

The respondents are then called upon to put in the rate, and prove the allowance and publication, where they are not admitted, either expressly, or virtually, by their not being included in the notice as grounds of appeal.

Respondent proves the rate.

If the parish officers do not attend, or refuse to produce the rate, the court may proceed in the hearing, provided notice has been given to produce it; and an attested copy of the rate may be then read in evidence (2), or the contents proved by parol testimony. (3)

If rate not produced, copy must be read.

The service of notice to produce a rate is good after the sessions are commenced (4). Every inhabitant is entitled, under 17 Geo. II, c. 3. s. 2. and 3., to inspect every rate, at all reasonable times, paying 1s. for the same, and to have upon demand forthwith copies of the same, or any part thereof, paying at the rate of 6d. for every twenty-four names, under a penalty of 20l. to be forfeited by the churchwarden or overseer, not per-

Service of notice good, after sessions commence. Inhabitants entitled to copies of rates, &c.

(1) As Surry, Kent, and Yorkshire, &c. Rex v. Newbury, 4 Term Rep. 475.

(2) See Rex v. St. Helen's in Abingdon, 1 Bott, 266. Pl. 263. where this was done, and no objection taken S. C. By the name of Rex v. Justices of Berkshire, 3 Glenb. on Elect. 132. 1 Const, 274. Pl. 288.

(3) Rex v. Webb, Trin. 41 Geo. III. where the point was considered as too clear to admit of argument.

(4) Decided, Rex v. St. Helens, supra, (2).

mitting

mitting such inspections, or refusing or neglecting to give copies.

The evidence for the appellant is next produced; and after the written testimony has been read by the clerk of the peace, and the witnesses (1) sworn, examined, and cross examined, the second counsel for the appellant sums up, and applies the matters proved to the question of law or fact which the court are to decide.

Second counsel sums up

The leading counsel for the respondent then states his case in answer to that of the appellant; brings forward his evidence in the same manner; which is likewise summed up by the counsel next him in succession; and finally, the leading counsel for the appellant replies upon the whole case.

Form of hearing appeals against removals.

The proceeding is similar in appeals against orders of removal, excepting, that as the respondent begins, so he closes the case where evidence is called on both sides. But in all sorts of appeals, if the party who states his case last calls no witnesses, his junior counsel has no right to address the court: and he who leads for the adversary is debarred of a reply, but he may observe upon such new cases as are cited by the other side.

(1) For the general rules respecting written evidence, see ante, Vol. i. 30. et seq. Ib. 563. et seq. As to the competency of witnesses, ante, Vol. i. 435. et seq. and Rex *v.* Kirdford, 2 East, 559. Subpœnas, to compel the attendance of witnesses, when living within the county for which the sessions are held, are issued by the clerk of the peace, and also from the crown office. But where the witnesses live in a different county, the crown office alone can issue the subpœna. And if the witness disobeys it, quære if the court of King's Bench will not punish him by attachment. See Rex *v.* King, 8 Term Rep. 585. an attachment was granted by the court of King's Bench, for not obeying a subpœna from the crown office to give evidence on a criminal prosecution at the great sessions for Carmarthen. Rex *v.* Booth, Hil. 45 Geo. III.

In an appeal against an order of removal, the inquiries should not extend on either side beyond the time when it was made; for the justices should not quash a good order upon matter which happens *ex post facto*. (1) Evidence confined to matter, antecedent to date of the order.

Objections may be taken by either side, previous to the hearing, or while it is going on; such are objections to the jurisdiction, service of notice, the competency of witnesses, and other matters. Where this occurs, all the counsel (2) on the side which takes the objection may be heard in support of it; those on the other side are next heard against it, and then the leading counsel for the objection replies; after which the opinion of the court is taken upon the question. (3) Arguing objections.

If any difference arises respecting the admissibility of evidence, it is decided in the same manner by the court. But no bill of exception lies against their opinion (4). For, in the common case of a bill of exception tendered to the judges, the jury alone are the proper persons who would be to decide whether they believe the evidence or not; the judges have nothing to do with the belief of the evidence; they are not to determine on its credibility, but upon the consequence of law arising from it. But the justices at sessions are judges of the fact as well as No bill of exceptions against justices' opinion.

(1) Per Page, J. Rex *v.* Widworthy, Burr. S. C. 109. Per Lord Ellenborough, in delivering the court's judgment. Rex *v.* Horsley, 8 East, 410.

(2) This seems to be the strict course of proceeding, where the court has not laid down some rule as to the number it will hear. But in practice an objection is usually sustained and opposed by one counsel upon each side, unless where the point is of great importance.

(3) It is not always necessary to hear the argument through. If the court agree to the objection, they may call upon the counsel who are of the other side to repel it by argument without hearing those who take it. If clearly against it, they will decide without hearing counsel in that behalf.

(4) Rex *v.* Preston, Burr. S. C. 77.

law;

law; they are the jury as well as judges: it is in their breast only whether to believe or disbelieve the evidence; and who is to take upon himself to say what portion of evidence they do believe, and what they do not? Suppose six of the justices believe the evidence, and two of them do not believe it, are the two to conclude the six as to belief of the fact? When the justices specially state the fact, it is the act of the whole court. (1)

Mandamus if they refuse to admit evidence.

If, however, they refuse to receive the evidence which they should have admitted according to the rules of law, the Court of King's Bench will grant a mandamus to compel them to receive the evidence, and re-hear the appeal. (2)

(1) Per Lord Hardwicke, C. J. in. n. 4.

(2) It is in such cases the most convenient way for the justice, as well as the least expensive for the parties, to state a case for the opinion of the superior court, when they are so requested, and the point admits of doubt

CHAPTER XXXVIII.

Of the Judgment.

SECT. I.

Of the Manner of giving Judgment, and what Judgment the Sessions have Authority to give.

AFTER the whole case has been discussed, the court are to pronounce judgment. The justices by whom the order is made (1), and also those who are rated or rateable for that parish or place, whose interests may be affected by the judgment, have no right to vote. (2) *Manner of giving judgment. Justices interested can not vote.*

If

(1) Case of Foxham Tithing, 2 Salk. 607. Holt, 517. Rex *v.* Earl of Ashburnham, ante, 360. (3). But see Rex *v.* Sowton, Burn. S. C. 125.

(2) Rex *v.* Yarpole, 4 Term Rep. 71. 2 Bott, 708. Pl. 777. Where, upon an appeal against an order of removal from Leominster to Yarpole, fifteen magistrates were present, eight (of whom three were rated at Leominster) voted for confirming the order, and seven for quashing it. The order was confirmed, subject to the opinion of K. B., whether these three justices had a right to vote. The counsel for the order admitted, that it could not be supported, and the court quashed it. It is also upon record, that Lord Raymond, who lived in the parish of Abbots Langley, went off the bench, (i. e. in the court of King's Bench,) when an order concerning that parish came before the court. Practice cannot overturn so fundamental a rule of justice, as that a party interested cannot be a judge. Per Cur. Great Chart and Kennington, 2 Str. 1173. Burn. S. C. 194. The 16 Geo. II. c. 18. which enables justices, rated or chargeable in any parish, to make orders in matters concerning such parish, provides, "that it shall not authorize or empower any such justice to act in the determination of any appeal to the quarter sessions, relating to any order, matter, or thing, relating to such parish where they are so chargeable." In a writ of assize, brought

Equality of voices, consequence of.

If the magistrates, who have a right to join in the court's determination, should be equally divided in opinion, no judgment can be given; for all judges of the same court are of equal authority; and there is no such thing as a casting vote. Unless something farther is done, the direct result must be, to frustrate the intention of the legislature, in giving an appeal to the sessions. For the subject of appeal, if a rate, would continue unaltered, if an order of removal would remain in force. To avoid such mischief, the justices must adjourn the appeal from session to session, if necessary, until a majority shall be of opinion either on one side or the other. (1)

Adjournment.

Judgment must be the act of the court.

The judgment must be the act of the court, and the opinion of the magistrates who constitute it. They cannot refer it to others to decide for them, unless by the parties' consent. (2)

The

brought in the court of King's Bench, to try the right to the office of chief clerk of the King's Bench against Mr. Rowland Holt, who was in possession under an appointment of his brother, Lord C. J. Holt. The chief justice was not on the bench during the trial, but sat on a chair near his brother's counsel uncovered. Bridgman *v.* Holt, Show. Par. Cas. 211.

(1) This seems to be their bounden duty. For otherwise, the court will grant a mandamus to compel them to enter continuances, and hear the appeal at a subsequent sessions. Further, if they neglect to adjourn it with a criminal intention, or if the consequence is the failure of justice in any respect, the court would grant an information against the justices who attended the sessions. Rex *v.* Justices of Westmorland, 2 Sess. Cas. 351. See Bodmin *v.* Warlingen, ante, 436. (4), that it is the duty of the clerk of the peace to do so.

(2) See ante, 348. (1). Per Parker, C. J. Rex *v.* Townsend, ante, 366. This of course does not refer to cases stated for the opinion of the court of King's Bench. But when the subject matter is a public trust reposed in the justices, and no individuals are parties to the order, it seems, that the magistrates may refer it to a committee of their own body, and afterwards adopt their report. Thus, where the justices at sessions appointed a committee of magistrates, either for repairing an old, or for building a new bridge, &c. Per Lord Kenyon, C. J. "It appears, that the justices were warranted in what they did, with regard to the appointing of the committee;

The quarter sessions, with the consent of parties, referred the consideration of an appeal against a poor's rate to three justices out of sessions, or any two of them, and afterwards adopted the opinion of these gentlemen, and made an order accordingly, without exercising their own judgment. Lord Mansfield—"If they did this of their own accord, without the consent of parties, it cannot be supported; for they are not warranted to delegate their authority; but if they acted with the consent of the parties, I think they have done very right; and we never suffer the party who consented to the reference, by coming here, to set it aside. And I think it sufficient, if the attornies consented, and attended the reference." (1)

But may refer by consent.

Consent of agents sufficient.

The authority of the sessions arises from the appeal. They cannot make an original order of removal (2), nor confirm one without appeal (3). And their power is confined to quashing or affirming the order of the two justices. They cannot, therefore, make an order to remove the pauper to a third parish no wise concerned in the order of appeal (4); or even to send him back to the parish from whence he was removed. (5)

1. Jurisdiction of sessions over orders of removal, arises from the appeal.

Cannot send pauper to the removing parish.

The

mittee; it was proper that the information should be acquired out of the sessions; and the act of the committee was afterwards confirmed by the sessions." Rex *v.* Justices of Glamorganshire, 5 Term Rep. 279.

(1) Rex *v.* Justice of Northampton, Cald. 30. See also Rex *v.* Natland, Burr. S.C. 793.

(2) Rex *v.* Bond, 2 Show. 503. Anon. Salk. 479.

(3) Rex *v.* Leverington, Burr. S. C. 279. 2 Bott. 706. Pl. 775. Godalmin *v.* St. Michael's, ib. n. a. Road *v.* North-Bradley, 2 Str. 1168. 1 Sess. Cas. 280.

(4) Rex *v.* Amner, 2 Salk. 475. and see Rex *v.* Oswell, 2 Salk. 472. Haine's case, Comb. 286.

(5) Reg. *v.* Milverton, 7 Mod. 10. Where an order of sessions, quashing an order of removal, and directing the party to be sent to the parish from whence he was thereby removed, was quashed in B.R. as to the direction to send back the pauper, and confirmed as to the remainder. See also Honiton *v.* South Beverton, ante, 220. But, where "two

May alter their judgment during the sessions.

The sessions being in contemplation of law all but one day, the justices may alter their judgment at any time while it continues. They may, therefore, make an order to vacate a former one made during the same sessions (1). Thus, after quashing an order of removal, they may su-

"two justices of peace &c. reciting, that upon hearing the parishioners of Honiton, Axminster, and Colliton, concerning the last settlement of one Hurley, (then residing in Honiton,) it appeared to them that the said Hurley was last legally settled at Axminster, therefore they ordered him to be removed thither; from which order Axminster appealed to the quarter sessions, where the order was repealed; and the sessions further ordered, that the said Hurley should be removed to Colliton, as being legally settled there; but the order did not recite that Colliton was heard upon the appeal. And now it was moved to quash the last part of this order of sessions; first because it was an original order as to Colliton, and so, they are deprived of an appeal, which is given by the statute; and the sessions ought only to have vacated the first order, and not to have made any order upon Colliton; for, by this means, Colliton is charged without any remedy, notwithstanding they could make it appear, that Hurley had a later settlement in any other parish whatsoever, for that this order of sessions is positive upon them. Sed non allocatur; because it appears that Colliton was a party to the first order made by the two justices, and so by consequence to the appeal; wherefore the sessions might well settle him upon them, because, by the appeal, Colliton was before the sessions; secus, if Colliton had not been a party to the original order, but mere strangers; for then the sessions could not charge them, as not being before the court." Rex v. Colliton, Carth. 221. Also where two justices made an order of removal, from which order the pauper appealed; and the sessions, without expressly vacating the order of two justices, made an order to return the pauper to the parish from which he was removed. It was objected, that the authority of the sessions extends only to vacate or affirm, and therefore, that this was a new and original order, which they had no power to make. And Holt, C.J. was of that opinion, but two judges against him; for that the sessions' order does vacate the order of two justices by implication, and that is sufficient in this case. And upon their opinion the order was confirmed. Rex v. Hartfield, Carth. 222.

(1) St. Andrew's, Holborn, v. St. Clement Danes, 2 Salk. 495.

persede

persede their first order, and make a new one to confirm the original order. (1)

But, in such a case, they ought to set the first wholly aside, and enter up the last as the only order. For the effect of the court's setting aside the first is, that it ceases to be an order, and consequently ought not to be returned to the court of king's bench as an order vacated by another order, but should be annulled and made nothing (2). The justice's power expires with the sessions, unless continued to the next by adjournment (3). Where an order of removal, therefore, was quashed at one sessions, and the ensuing sessions made an order of review, and quashed the order of the former sessions, because made by surprise; the court of king's bench were of opinion, that the order of review must be quashed, for the justices have no power after the first sessions. (4)

But not at one subsequent sessions unless continued to it

The jurisdiction of the sessions over poor's rates corresponds in most respects with that over appeals against removals. Their power arises out of the appeal. They cannot, therefore, make an original order on the parish

Jurisdiction of sessions over poor's rates arises from an appeal

(1) Battersea v. Westham, 5 Mod. 356. St. Andrews, Holborn, v. St. Clement Danes, 2 Salk. 494. ib. 606. 6 Mod. 287. S. C. Also, in a recent case, when a certain number of magistrates, in the early part of the day, appointed a person surgeon of the county gaol; and another set, in a subsequent part of the same day, appointed another person. The court of king's bench held the latter appointment good, and the former vacated. Rex v. Justices of Glamorganshire. This, however, is a very dangerous power to exercise, as the same magistrates seldom continue to sit during the whole of the sessions, and, if the second order is made without good reason to warrant it, the court would, in all probability, grant an information against the magistrates who concurred in making it.

(2) Per Holt. C. J. St. Andrew's Holborn, v. St. Clement Danes, ante, (1).

(3) See ante, 435.

(4) Rex v. Cuckfield, 2 Salk. 477. Pridgeon's case, Cro. Car. 341. ante, 285. (2). Rex v. North-Bradley. 2 Str. 1168. Rex v. Michaelstone Vedoes post. 459. (1).

 officers

officers to make a rate (1), neither can their orders relate to the future payment of rates. (2)

Further, if the sessions make an order directing two districts of the same parish to contribute to the maintenance of the poor of the entire parish in certain proportions, it is extra-judicial and void. (3)

Might make a rate, prior to 17 Geo. II. c. 38.

Prior to 17 Geo. II. c. 38. the sessions might quash the old rate (4), and either order the parish officers to make a new one (5), or do it themselves. (6)

This last power was attended with much inconvenience. The facts required to enable the justices to make a new rate must often exceed their knowledge; and the inquiries necessary to obtain exact information took more time than they could spare (7). Those also who were aggrieved by such a rate, had no opportunity of appealing against it. (8)

By 17 Geo. II. must order the officers to make a new rate.

To remedy these inconveniences, it was enacted by 17 Geo. II. that if, "upon appeal from the whole rate, it shall be found necessary to quash or set aside the same, then, and in every such case, the said justices shall, and are hereby required to order and direct the churchwardens and overseers of the poor to make a new one; and they are hereby required to make the same accordingly."

(1) Rex *v.* Aberford East, 2 Ld. Raym. 798. Garret *v.* Foot, Comb. 133.

(2) Rex *v.* Wrexham Regis, 1 Bott, 101. Pl. 126.

(3) Rex *v.* Newell, 4 Term Rep. 266.

(4) Case of St. Leonard's, Shoreditch, Holt, 508. 17 Geo. II. c. 38. s. 6.

(5) Rex *v.* Aberford East, 2 Ld Raym. 798. ante, (1).

(6) Rex *v.* Audley, 2 Salk. 526. Rex *v.* Justices of Shrewsbury, 2 Str. 975. 17 Geo. II. c. 38. s. 6.

(7) Per Ashhurst, J. Rex *v.* Maddern, 1 Term Rep. 625.

(8) Eod. Jud. ibid. and 17 Geo. II c. 38. s. 6.

SECT.

SECT. II.

Of Amendments by the Court of Sessions.

THE power of amending orders of removal by the sessions is given by 5 Geo. II. c. 19. which enacts, that upon all appeals to be made to the justices of the peace, at their respective general or quarter sessions, against judgments or orders given or made by any justices of the peace, the justices, at any general or quarter sessions, shall "cause any defect or defects of form, that shall be found in any such original judgment or orders, to be rectified or amended, without any cost or charge to the parties concerned; and after such amendment made, shall proceed to hear, examine, and consider the truth and merits of all matters concerning such original judgments or orders," and make such determination thereon, as if there had not been such defect or want of form in the original proceeding.

1. Of amending orders of removal. Power given by 5 Geo. II. c. 19.

This power is confined entirely to the amendment of defects or mistakes of form, which appear upon the face of the order.

Confined to mistakes in form

The inhabitants of Great Bedwin appealed to the sessions, from an order of justices beginning thus, "Wilts, *to wit*. To the churchwardens, &c. of the parish of Wilcot, and to the churchwardens, &c. of the parish of Great Bedwin, in the said county." And it states, that C. M. and his family have dwelt for some time in Wilcot, under a certificate from Great Bedwin; and then goes on thus, "Now the said C. M. being reduced to great poverty, lately applied to the churchwardens, &c. of the parish of

What defects not amendable.

 Wilcot

Wilcot aforesaid, who accordingly did relieve him," and therefore the justices remove him to Great Bedwin. The sessions, on motion on behalf of the parish of Wilcot, suggesting defects in form, and praying that they may be amended, pursuant to 5 Geo. II. c. 19. were of opinion that the original order was amendable by the act; for it appears to them, on due examination upon oath, that the said order was really and truly made by the two justices, on the complaint of the churchwardens, &c. of Wilcot, in due manner made to them on that behalf, "that the said C. M. his wife and children, are actually become chargeable to Wilcot;" but that the omitting to mention it was a mere mistake in drawing up the order; that it doth also appear to this court, that the said G. H. and J. S. were, at the time of the making the said order, two of his majesty's justices of the peace for the said county of Wilts, and one of them of the quorum, and that the omitting to mention the same was also a mere mistake in drawing up the said order; and that the said defects were amended in court. Lee, C. J.—The act directs that the sessions shall amend defects in form, and afterwards proceed on the merits: one would think that this meant defects, or mistakes appearing upon the face of the order, mere defects or wants of form. But some of these matters here amended seem to be merits; as the adding, "upon complaint of the overseers of the parish from whence the paupers were removed," without which complaint the justices have no jurisdiction (1). Then what can be more of the merits, than the certificate man's having become actually chargeable (2). Now the two justices have not adjudged that; they only say, that he applied to the overseers, and was relieved by them, but it does not appear that it was at the parish expence (3).

(1) Ante, 192. (2).

(2) Ante, 175. ib. 194. (2). ib. 198.

(3) Ante, 177.

If

If there be any opposition between form and merits, these matters must be merits. As to their being justices of the county, a plain reference to the margin is sufficient; yet this is uncertain as it is worded, to which of the two parishes the words "in the said county" relate; they were both in Wiltshire (1). The allowing such amendments as these to be within the true construction of this statute, would throw the determinations of all cases of this sort into the hands of the sessions. The other judges concurred; and Mr. Justice Wright added, that the sessions cannot amend any thing which requires examination; and the orders were quashed. (2)

It appears from this and other cases, that all averments necessary to shew the magistrate's jurisdiction, to make the order in question, are matters of substance, and cannot be amended under this statute. Such as, if they do not clearly state themselves to be justices for that county in which the place from whence the paupers are removed is situate. (3)

Statements of jurisdiction, matters of substance, and not amendable.

(1) Ante, 192, et seq.

(2) Rex v. Great Bedwin, Burr. S. C. 163. Lord Kenyon, C. J. observed upon this case: "It is now too late to discuss, whether or not the court of quarter sessions could amend in this case. It has been decided in Rex v. Great Bedwin, that the sessions can only amend mere defects or wants of form. I verily believe that if the legislature had been asked what was their intention, when they passed the statute 5 Geo. II. c. 19. they would have said they meant, that if upon inquiry it appeared that the pauper had been removed to his proper parish, the sessions should have power to correct all defects in the orders; but the decision to which I before alluded, was made ten years after the passing of the act; and at the time when Lord C. J. Lee, who was peculiarly conversant in sessions law, presided here. And though I lament that that decision was made, because it renders the statute of little avail, yet it has been acted upon ever since, and it is of importance to adhere to determinations respecting settlements." Rex v. Chilvers Coton, 8 Term Rep. 178.

(3) Rex v. Stepney, ante, 190. (1). Rex v. Chilvers Coton, ib. Rex v. Moor Critchell, ib. &c.

 But

Mistake in ordering pauper to be removed to the parish complaining may be amended.

But where an order of removal was made, from the parish of Luggershall to the parish of Harrow, upon an adjudication that the settlement was in Luggershall, and the justices ordered the paupers to be carried to Harrow. Upon appeal, the sessions confirmed this order, and amended it, by striking out Luggershall and inserting Harrow. It was moved to quash these orders, for that the judgment being defective, cannot be altered. But *the court* seemed to be of opinion, that it was only a defect in form, being a mistake of the clerk, who filled up the blank order with the name of Luggershall instead of Harrow; but they granted a rule to shew cause, and in the Trinity term following, the order of sessions was confirmed by consent. (1)

Power to amend rates extends to matter of substance.

The power of the sessions to amend rates, extends beyond matters of form.

17 Geo. II. c. 38.

By 17 Geo. II. c. 38. s. 6. and indeed by 43 Eliz. (2), the justices, where they see just cause to give relief, are required to amend the rate, in such manner only as should be necessary for giving relief, without altering such rate or assessments, with respect to other persons mentioned in the same.

2. Species of amendment prior to 41 Geo. III. c. 23. If an omission in the rate, no amendment.

But all amendments of rates were confined to two cases, prior to 41 Geo. III. c. 23. 1st, Mere defects of form under 5 Geo. II. c. 19. 2d, Where the appellant, being overcharged, might be reduced (3). Where the names, therefore, of one or more persons were omitted in

(1) Rex *v.* Harrow on the Hill, 2 Bott. 706. Pl. 773.

(2) Case of St. Leonard's Shoreditch, Holt, 508.

(3) Rex *v.* Cheshunt, 2 Term Rep. 623.

a rate

a rate, which ought to have been inserted (1), or persons were under-rated, which is an omission of property, the rate must have been quashed; for the due proportion of every other person rated was thereby affected; and as they could not be concluded by proceedings to which they were no parties, it became necessary to regulate the proportional assessment of the parish by a new rate.

But the law is altered by 41 Geo. III. c. 23. s. 6. which requires, that persons appealing, because any other person is rated or omittted to be rated, or because any other person is rated for any greater or less sum than they ought to be, or for any other cause that may require any alteration in the rate, with respect to any other person, shall give notice to the persons interested in the event of such appeal, who may appear and be heard if they think fit. It further provides, that the majority of justices may order the names of such persons to be inserted and rated at any sum, and that of others to be struck out, or the sum at which they are rated altered, in such manner as they shall think right. Power of amendment by 41 Geo. III. c. 23.

The true principle to regulate the amendment, or quashing of rates, so far as it can be laid down in the abstract, where a good deal must depend upon the peculiar circumstances of each case, seems to be, whether the amendments sought to be introduced are such as must essentially alter its proportion and character, so as rather to render it a new than an amended rate. If they cannot have this effect, the magistrates should amend; Principle of amendment under that act.

(1) Rex v. Maddern, 1 Term Rep. 625. Rex v. St. Agnes, 3 Term Rep. 480. Rex v. Darlington, 6 Term Rep. 468. acc. The opinion of Aston, J. in Rex v. Whitney, 5 Burr. 2634. and of Lord Mansfield, C. J. Rex v. Ringwood, Cowp. 326. are contra. But these opinions are adverted to, and noticed as being overruled in Rex v. Darlington, supra.

but otherwise, as they are expressly prohibited from making a new rate, they ought to quash.

Instances where rates may be quashed.

Thus, if the ground of complaint is, that personal property is altogether omitted (1); or, that the real estate is taxed ten times more in proportion than the personal (2); or, that the rate is made upon a principle altogether erroneous (3); or, that a large portion of property is omitted, and it does not clearly appear what persons ought to be rated for it (4); these seem cases in which the rate ought to be quashed. Because otherwise, the sessions must examine into the circumstances of every person in the parish, in order to render the rate perfect, and so make one altogether new, which they are forbidden to do by 17 Geo. II. c. 38.

SECT. III.

Of stating a Case for the Opinion of the Court of King's Bench.

Sessions not bound to state their reasons.

THE justices are not bound to state in their judgment the reasons upon which it is founded any more than other courts: it must be collected from the record (5). They need not set forth, therefore, whether they quash an order upon the form or the merits (6); but if they

But if they give a bad

(1) See Rex *v.* Dursley, 6 Term Rep. 53. and the case of St. Leonard's Shoreditch, Holt, 508.

(2) Ib.

(3) Rex *v.* Sandwich, Doug. 562. Cald. 105. S. C. But these cases were prior to 41 Geo. III. c. 23. and are only put by way of examples, and not as judicial determinations.

(4) Rex *v.* Aberavon, Mich. 45 Geo. III. ante, 432.

(5) South Cadbury *v.* Braddon, 2 Salk. 607. Rex *v.* Audley, 2 Salk. 526.

(6) South Cadbury *v.* Braddon, ante, (5). But that they ought to do so, see post, 332.

give

give a reason which is a bad one, the court must take notice of it, and quash their order. (1)

reason, B. R. will quash.

It has been shown, that no bill of exception lies against the justice's determination (2); neither can they be compelled to state a special case for the opinion of the court of king's bench, because a case must always depend upon particular facts, which it is the exclusive province of the sessions to find. (3)

Cannot be compelled to state a case.

On appeal from an order of removal, the sessions confirmed the order, but refused to state a special case. The counsel for Oulton, the appellant parish, excepted against their refusing to state the case specially, and the exception was returned into B. R. together with the orders. The court refused to grant a rule to shew cause for quashing these orders, because they can take notice of nothing but what was contained in the order. The counsel for Oulton then obtained a rule to shew cause why the return should not be amended, and the state of the case inserted by the clerk of the peace in the body of the order of sessions. On shewing cause, the clerk of the peace's counsel had no objection, if the court

No amendment of clerk of peace's return, without session's consent.

(1) Rex *v.* Audley, ante, 456. (5). and see Rex *v* Browne, ante, 273. (3). See also Rex *v.* Gayer, 1 Burr. 245. ante, Vol. i. 53.

(2) Rex *v.* Preston, ante, 443. (4).

(3) "To be sure it is a thing very much to be censured and discommended, when an inferior jurisdiction endeavours to preclude the parties from applying to a superior jurisdiction." Per Lord Hardwicke, C. J. Rex *v.* Oulton, Burr. S. C. 64. S. P. Per Dennison, J. Rex *v.* Mayfield, Burr. S. C. 453. But in determining on the propriety of granting or refusing a case, the justices should be guided by the consideration, whether the question involves any difficult point of law; for though, as Lord Hardwicke says, it is censurable in an inferior jurisdiction, to endeavour to preclude the parties from applying to a superior jurisdiction; they are not through ill-founded fear of such a censure, to suffer parties to run into unnecessary expence, where there is little probability that the superior court will alter their determination. A similar observation has not unfrequently been made of late years, by the judges of the K. B. on some cases which have been brought before them. Though the court of quarter sessions refuse to grant a case, the parties may bring up the order by certiorari for any defect apparent on the face thereof.

thought

thought he might do it. But the respondents contended, that the return was perfect, and opposed the rule. Lord Hardwicke—I do not see what it is possible for the court to do in this case without consent. Here is no consent; so far from it, that, on the contrary, the parish concerned in interest opposes it. Here is an order of removal made by two justices; an appeal therefrom; and a general order on that appeal, for confirmation of the order of two justices. The counsel at sessions except to the order of sessions in the words of a bill of exception, and state the fact. If the fact be true, the ground of the exception is right; but the exception sets forth, that the court of sessions refuse to state the matter specially. How then shall we do this that is now desired of us without their consent, even though the clerk of the peace should consent? It does not appear to us that the fact alledged is true; it is only the allegation of counsel, or perhaps there might be evidence given of it, and the sessions might not believe the evidence. Page, J.—I do not know that this court ever inquires into the facts upon which the justices have determined; and they themselves have stated none, but have adjudged generally. (1)

Session may state a case, or refer to judge of assize.

But if the sessions entertain any doubt upon a point of law, they may either refer the matter to the judge of assize for his opinion, or state a case for the determination of the court of king's bench, and this without the consent of the parties. (2)

Refer a point to a judge of assize.

"The sessions do not always refer the whole case to the judge of assize: sometimes they refer only a particular point, and reserve the final determination of the whole matter to themselves." (3)

(1) Rex v. Oulton, Burr. S. C. 64, ante, 457. (3).

(2) Rex v. Justices of Sussex, 2 Bott, 745. Pl. 835.

(3) Per Probyn, Rex v. Tedford, Burr. S. C. 57. But see Lord Hardwicke, C. J. ib.

And

And no other sessions has power to grant a case but that before which the appeal is decided and judgment given. (1)

Manner of stating a special case.

But it is now more usual to obtain the decision of the superior court, by stating a special case. This is commonly settled, and signed by the junior counsel on each side. If any difference arises between them upon the statement of facts, reference is had to the chairman's notes, to ascertain them. But a fact may be so important or doubtful, as to require that it shall be specifically found by the bench, as other justices may differ from the chairman with respect to it. If the counsel cannot agree upon a case, the chairman may, with the con-

(1) By an order of two justices, William Thomas and Mary his wife were removed from the parish of Michaelstone Vedoes, to the parish of Koedhermeer, both in the county of Monmouth.

An appeal against this order came on to be tried at the last Easter sessions for the said county, when the Court was of opinion that the paupers were settled in Michaelstone Vedoes and quashed the order of removal. A case was then applied for, but not granted, and an unconditional order for quashing the order of removal was entered and remained in the records of the sessions. At the following Midsummer sessions the respondents again moved that a case should be stated for the opinion of the court of king's bench in this appeal, on the ground that the sessions were mistaken in point of law in holding the settlement of the paupers to be in Michaelstone Vedoes. The sessions now made an order that such a case should be stated and signed by the chairman; and a certiorari was lodged at the Michaelmas sessions to remove these several orders.

Campbell obtained a rule to shew cause why this certiorari should not be quashed *quia improvide emanavit*; against which *Money* shewed cause, contending that the sessions might at any time state a case for the opinion of the court of king's bench. But Lord Ellenborough and Le Blanc, Bayley and Dampier, Justices, were clearly of opinion that the magistrates had exceeded their jurisdiction at the Midsummer sessions, and had then no power to grant a case or in any respect to controul or qualify the absolute order made at the Easter sessions for quashing the order of removal. Rule absolute.

Rex *v.* Michaelstone Vedoes, Mich. 54 Geo. III. Ex Relatione Mr. Campbell.

currence

currence of the majority of justices, state and sign one himself.

No particular form of stating a case.

There is no certain form of submitting a case by the sessions to the judgment of the court of king's bench. (1)

Must state facts and not evidence.

The justices of sessions are judges of the fact, and the court of king's bench are judges of the law upon the facts, though not of the facts themselves (2). A case, therefore, must state facts and not evidence. By this is meant, that they must draw their own conclusion upon what is asserted by the witnesses, and state that conclusion as the fact, instead of the evidence upon which it is founded; otherwise the court, where it is material to the question before them, will send the case down to be better stated. (3)

Instances of facts which must be stated.

Thus the place of a birth is a fact which must be found, where a settlement may turn upon it (4). As also, whether there has been a hiring for a year, if that be material to the pauper's settlement (5). So, in a question upon the validity of a settlement by indentures of apprenticeship, if it be not stated that the indentures are not stamped with a 6d. stamp, that fact cannot come before the court, for they cannot take notice of any thing but what is strictly before them by the order (6). So, whether a master give a particular consent to his apprentice to serve a third person, is a fact which the justices should find, and not state evidence of it (7). They must also state in what parish or

(1) Per Lord Hardwicke, C. J. Rex v. Tedford, ante, 458. (3).

(2) Eod. Jud. ibid.

(3) Rex v. Martley, Burr. S. C. 120.

(4) Ib.

(5) Rex v. Bray, Burr. S. C. 682.

(6) Rex v. St. Peter's Chester, 1 Bott, 544. Pl. 745. ante, Vol. i. 461. (1).

(7) Per Lord Kenyon, C. J. Rex v. Shebbear, 1 East, 73. ante, Vol. i. 504. (1).

township

township the place of the pauper's residence is situate. (1)

Likewise, upon a question of settlement by estate, the sessions ought to find whether it is a gift or a purchase (2). And in one respecting a settlement by being rated, they should set forth as a fact, whether the landlord or tenant is rated. (3)

Fraud is a fact which the sessions must expressly find; it is not enough to state such evidence as would be sufficient to induce the superior court to conclude that it did exist in the case. Thus, it must be specifically found that the renting a tenement at 10l. *per annum* was fraudulent (4); or, that a pauper was fraudulently ejected from premises, in order to prevent his gaining a settlement by residing there forty days (5); or that a certificate was fraudulently granted (6); for the court of king's bench will not infer it, however strong the circumstances which are stated may be to warrant such a conclusion.

Fraud must be found as a fact.

(1) Rex *v.* Friendsbury, Burr, S. C. 644.

(2) Per Buller, J. Rex *v.* Warblington, 1 Term Rep. 241. 2 Bott, 495. Pl. 512. ante, 94. (1).

(3) Rex *v.* Rainham, 5 Term Rep. 240. 2 Bott, 741. Pl. 830. It is not meant by this, and the foregoing instances, that these circumstauces must be stated in every case of settlement of that particular kind in which they may occur; but, that when they have a necessary relation to the point in difference, the justices should state them as facts, instead of leaving it to the court of K. B. to infer them as conclusions from what is set forth. For the sessions cannot submit a question to the judges upon the weight of evidence. See Rex *v.* Llanwinio, 4 Term Rep. 371. post, 462. (3).

(4) Rex *v.* Weston, 2 Str. 1156. ante, 42. (1). S. C. by the name of Rex *v.* Kirton, and see the opinion of Buller, J. Rex *v.* Fillongley 1 Term Rep. 458. ante, 5. (1). Rex *v.* St. Margaret's in Lincoln, Burr. S. C. 728.

(5) Rex *v.* Llanbedergoch, 7 Term Rep. 105. ante, 54. (3).

(6) Rex *v.* Tamworth, Burr. S. C. 770.

Likewise,

Fraud cognizable only so far as respects the settlement.

Likewise, in examining these questions, "the justices are only to consider concerning frauds which regard the parish *(in order to gain a settlement in it)*. They are not to inquire concerning fraud between the parties; that would make them a court of chancery."(1)

B. R. how far bound by a general finding of fraud.

If the sessions find the fact of fraud generally, the court are bound by the finding.(2)

Thus, where the sessions, in a case stated for the opinion of the court of king's bench, found the taking of a tenement in H. to be fraudulent, and that it did not amount in the whole to 10l. a year, but referred the question whether the pauper gained a settlement in H. notwithstanding the fraud; the parish of L. (in which he was previously settled) not being privy to the fraud, and there being contradictory evidence as to the value. The court thought, that the conclusion drawn by the justices was decisive; for they expressly state, "*that it was a fraudulent taking*, and that it did not amount in the whole to 10l. a-year." (3)

B. R. may determine against their conclusion of fraud, if the facts are stated.

But where the sessions stated in a case the facts under which a purchase of a tenement was made for 39l., and concluded their case thus: "this court doth declare and adjudge, that the purchase made by Gill (*i. e.* that before stated) was fraudulent, and that the settlement of Gill, &c. was at Tedford (the parish in which he was settled previous to the purchase), but the parishioners of T. are no ways concerned in the said fraud." *Per* Lord Hard-

(1) Per Lord Hardwicke, C. J. Rex *v.* Tedford, ante, 458. (3).

(2) Per Lord Hardwicke, C. J. Rex *v.* Tedford, ante, (1). Per Buller, J. Rex *v.* Fillongley, ante, 461. (4).

(3) Rex *v.* Llanwinio, 4 Term Rep. 373. 2 Bott, 741. Pl. 829. See also Rex *v.* St. Nicholas in Harwich, Burr. S. C. 171.

wicke,

wicke, C. J.—"The justices are judges of the fact, and they may judge of the fraud arising from the fact; but we judge of the law upon the fact, though not of the facts themselves. If they had generally found the fraud, we might have been bound by such a general finding: *but when they state the facts particularly, the matter is as much open for our determination upon it as it is for theirs.*" The court afterwards quashed the order, being of opinion that the purchase was not fraudulent. (1)

In a case stated upon a rate, the court held themselves concluded, by its being found as a fact by the sessions, that the appellant was occupier of the property in question. (2) B.R. concluded if sessions find a fact.

In a case sent up for the court's determination, whether the landlord or his tenant was the person rated, the sessions set forth all the facts; and also stated, that, in their opinion, the landlord was intended to be rated. The court of king's bench were of opinion that this was a fact, which ought always to be found by the justices (3), and being so found in this case, held itself thereby concluded from entering into the question. (4)

That court decided likewise that it was concluded upon the question, whether the governor of a workhouse was a public annual office, by the sessions having found it to be so. (5)

(1) Rex *v.* Tedford, ante, 462. (1). In this case, the court did not presume fraud, but determined that the sessions were not warranted by the facts of the case, in drawing the conclusion, that the purchase was fraudulent. See also the opinion of the judges, Rex *v.* St. Nicholas in Harwich, Burr. S. C. 171.

(2) Rex *v.* Hurdis, 3 Term Rep. 497. ante, vol. 1. 175.

(3) See Rex *v.* Rainham, 5 Term Rep. 240.

(4) Rex *v.* Folkstone, 3 Term Rep. 505.

(5) Rex *v.* Ilminster, ante, Vol. i. 554.

"In

Case shall be presumed in general to be a full statement.

"In general, where a case is specially stated, that case is taken to contain the full reason of the determination made by the sessions; and therefore, if the court hold those reasons to be ill, they will quash the order of sessions." (1)

Must state the actual case.

The justices should, therefore, not only state all the facts which they consider necessary to enable that court of king's bench to form an opinion upon the point of law, respecting which they want information (2), but they should likewise set forth all those which are material and were proved before them, that it may be a true state of the case (3). For the inferior court cannot apply to the superior for its advice upon speculative points of law, but should confine themselves to such as are necessary to determine the appeal before them.

Instances in cases stated, upon a rate.

Thus, upon an appeal, because personal property was not rated, a case was stated, omitting by consent of counsel, the fact of usage in the parish as to rating it, in order to bring the general question of its rateability before the court. But the judges, who were at that time of opinion that the circumstance of parochial usage was material in deciding the particular case, declared, that the sessions and counsel had no right to waive stating it, and ordered the case to be referred back to the sessions, for the purpose of finding this fact. (4)

Statement of irrelevant facts surplusage.

But the statement of an immaterial or irrelevant fact will not prevent the court from deciding upon the merits

(1) Per Lee and Page, Js. Rex *v.* Tedford, ante, 458. (3).

(2) See Rex *v.* Dursley, 6 Term Rep. 53. 1 Bott, 289. Pl. 280.

(3) See the opinion of Lord Hardwicke, C. J. Rex *v.* Tedford, ante, (1).

(4) Rex *v.* Francis Hill, Cowp. 613. 1 Bott, 275. Pl. 269.

of

of a case (1); and they seem never to have remitted one back to the sessions, in order to find the fact of fraud, however pregnant such a conclusion might be on the evidence stated. (2) B. R. does not remit to have fraud found

SECT. IV.

Of the Form of the Order or Judgment upon the Appeal.

If a particular jurisdiction does not shew the matter (3) to be within their authority, it must be concluded to be out of it. (4) Order must state the session's jurisdiction.

The sessions must, therefore, set forth in their orders upon matters of appeal, as well as in other cases, sufficient facts to shew a jurisdiction.

The caption, or title (5), must consequently state the sessions at which the order is made, and that is held in and for the county (6). Also, whether it is a general, Form of the caption

(1) Rex *v.* Minchin Hampton, 3 Burr. 1310. a case upon a rate. Rex *v.* Middlezoy, 2 Term Rep. 41. case upon a settlement.

(2) See the cases upon Fraud, ante, 461.

(3) i. e. upon which they make an order.

(4) Per Twisden, J. Ex relatione. Holt, C. J. Rex *v.* Audley, 2 Salk. 526.

(5) The clerk of the peace does not prefix a caption to each order which he enters in the records of the session. He makes one general caption for each sessions or adjournment, under, and with reference to which he enters the several orders which are there made. But when it is necessary to draw out an order in form, as if one is to be removed by certiorari, or given in evidence, the caption is prefixed to it; and this is what is spoken of in the text

(6) Anon 1 Vent. 39

Must state the adjournment.

or general quarter sessions (1). Likewise, if an order is made at an adjourned sessions, it must appear, by the caption, when the original sessions were holden (2), because the exercise of the justices' jurisdiction is limited by 2 H. V. c. 4. to particular times. If there have been several intervening adjournments, it is usual to set them all out; but the continuance from day to day need not. Sunday being a *dies non*, it is not the practice to set out the adjournment from Saturday night to Monday morning (3). Also if an appeal is respited from one sessions to the next, the continuance by a proper adjournment should be entered (4); for, otherwise, the justices appear to make their order without jurisdiction. But this is unnecessary, where the justices are not confined to determine the appeal at a particular sessions; such is the case

(1) Where an appeal is given to the general quarter sessions only, as that against rates was under 43 Eliz. c. 2. it seems fatal to an order to state it to be made at "a general sessions," instead of "a general quarter sessions." See Purnall's case, 2 Salk. 476. Poor Sett. 140. Rex v. Funcock, 2 Salk. 474. Rex v. Colliton, Carth. 222. And Rex v. Justices of London, ante, 389. (3)

(2) Rex v. St. Michael's, Ipswich, 2 Str. 831. Rex v. Harrowby, Burr. S. C. 102. Rex v. Heptonstall, Burr. S. C. 88. In all which cases, orders were quashed for this defect. Rex v. Inhabitants of Middlesex, Andr. 101. See Rex v. Bartlett, post 467. (1)

(3) Order made by a sessions mentioned in the caption to be "held 12th January, being Monday after the Epiphany, and continued by several adjournments to this day." It was moved to quash this order, because every particular adjournment ought to have been set out, in order to shew that there was no discontinuance; but held that there was no necessity for setting out the adjournments, they being merely discretionary. Rex v. Inhabitants of Middlesex, Hil. 11 Geo. II. Andr. 101. 3 Hawk. P. C. 89. Book ii. chap. viii. s. 14. Caption of an indictment of sessions was, *[illegible] tent. vicessimo et vicessimo octavo die Julii, &c.* Per Holt, C. J. It is naught, for though a sessions may adjourn from one day to another, and so sit by adjournment, yet it must not appear in a lump as sitting three days together, but distinctly. Langfield and Battle, 2 Salk. 605.

(4) Rex v. Hedingham, Sible, Burr. S. C. 112. Rex v. Yarpole, 4 Term Rep. 71. See also Rex v. West Torrington, Burr. S. C. 293. and ante, 437. (7), post. 507. (2).

of

of an appeal against overseers' accounts, under 43 Eliz. c. 2. (1) The caption should set forth, likewise, the names of as many of the justices who appear at the sessions as are sufficient to shew it to be regularly held in point of numbers; and one which contained the names of some of the magistrates present, adding the words, "and others of their fellows," has been held sufficient (2). But it is usual to set out the names of all the justices who attended the session or adjournment, at which the appeal was heard, except those who made the order. (3)

It

(1) Rex *v.* Bartlett, 1 Bott, 306. Pl. 343. This was an order of sessions, made in an appeal against overseers' accounts. Being removed into B. R. the following objections were taken to it among others: *First Exception.* The appeal was lodged at a former sessions; and as it does not appear when they were held, it might be an illegal day, and the court will not intend that the sessions were held on a right day, unless that appears. *Second Exception.* It does not appear that the appeal was adjourned; and if not, the justices cannot proceed *de novo*, every new sessions being in nature of a new court. Lord Hardwicke, C. J. All the exceptions but one have received answers; viz. that touching the jurisdiction of the justices of the sessions, as to the continuances; and I do not think that the justices are bound to make formal entries of them. As to the holding of the former sessions, we are not to presume it to be held at a wrong day; and it is well enough to say, that it was done at the last general quarter sessions, and if you had any objection, you might have removed the former order; it is like the case of exception to the recitals of original writs, which cannot be taken advantage of, unless the original is returned by certiorari.

(2) Rex *v.* Inhabitants of Middlesex, Hil. 10 Geo. II. Andr. 103.

(3) It seems as if it had been held in one case, that if their names are set out in it, the order will be quashed. Case of Foxham Tithing, 2 Salk. 637. According to the report, "a justice of peace was surveyor of the highway, and a matter which concerned his office coming in question at the sessions, he joined in making the order, and his name was put in the caption, and it was quashed." But in Rex *v.* Sowton, which was an order of sessions, made upon an appeal from an order of removal, not only the names of the justices who signed the original order appeared in the caption of the sessions, but the case for the opinion of the court of King's Bench was signed by them only. No notice

Need not state one to be of the quorum.

It was formerly necessary, in a variety of cases, to state that one, at least, of the justices, was of the quorum; but since the 26 Geo. II. c. 27. it is not so; and indeed it is usual, on making out commissions now, to make all the justices, but one or two, of the quorum (1). But if the caption describes them to be justices of the peace, it need not state any other commission by virtue of which they sit; for it is in that capacity they hold their sessions, for the examination and judging of matters relating to the poor. (2)

Must shew that it is made on appeal.

An order must likewise appear to be made on appeal, for the court will not supply such defect by affidavit (3). But one beginning, "Upon hearing the appeal of Burcott," was held well enough, for it must be intended to be the appeal of the parishioners (4). And where an order of two justices was quashed at sessions *upon appeal*, without saying *at the appeal of the party grieved*, the court were inclined to quash the order for this fault, until they were informed that the precedents were most of them so;

tice was taken of this point, but the order of sessions was quashed on the merits. Burr. S. C. 125. Likewise in an appeal against overseers' accounts; the case stated, that one of the churchwardens, being also a justice, did not sit to hear the appeal at the sessions, but it appeared by the caption that he was present at them. The court of B. R. was of opinion, that if he had acted as judge in the cause, it would have been an objection fatal to the order, but that as it appeared by the case, that he withdrew and did not sit at the determination of the appeal, it cured the objection. Rex v. Earl of Ashburnham, ante, 360.

(1) In Surrey all but one.

(2) Anon. 19 Vin. Abr. 353.

(3) Garrat v. Foote, Comb. 133. 1 Bott, 262. Pl. 253 which seems a loose note upon this point in an appeal against a poor rate. Anon. 2 Salk. 479. S. P. in an appeal against an order of removal, S. C. by the name of Tudy v. Padstow, 3 Salk. 257. Godalming v. St. Michael's in Winchester, Burr. S.C. 278. n. Road v. North-Bradley, 2 Str, 1168. 1 Sess. Cas. 280 S.C.

(4) Rex v. Burcott, Sett. and Rem. 25.

and

and for that reason, and that only, as the chief justice declared, the order was confirmed. (1)

Need not state the time of removal

The time at which the removal was made, or a notice of the original order given, need not be set forth in the order of sessions. (2)

Should distinctly refer to the order or rate, &c.

But it should refer with sufficient distinctness to the order or rate, which is the subject matter of the judgment. (3)

Form of the adjudication

The substantial or adjudicating part of the judgment should be expressed in such a manner, as to render the order conclusive between the parties, when decided upon the merits; but to prevent its being so, when given upon a point of form. (4)

1. Order on appeal against removals.

If the judgment upon an appeal, against an order of removal, be for the appellant, it is, 1st, To allow the appeal; 2d, To quash the order. When, for the respondent, 1st, To dismiss the appeal; 2d, To confirm

(1) Rex v. Almanbury, 1 Str. 96. Fort. 301, S. C. Where it is said that the precedents were four to one against this form, but most of them from the West Riding of Yorkshire, whence the case came, agreed with it.

(2) See Milbrooke v. St. John's, Southampton, ante, 398. (2) Rex v. Turley, 1 Sess. Cas. 274. Road v. North-Bradley, ib. 280 See also Rex v. Brimpton, Hil. 45 Geo III, ante, 184. (2). Browne's case, Comb. 448. Sembl contra. Per Holt, C. J. "Wheresoever it doth appear that there might be an intervening session by law, it lieth upon the party to prove, that he had not notice till after the next session. Nay, it should appear so in the order of sessions. Ib.

(3) As rates cannot be removed by certiorari, it is usual, and seems proper to set forth the title and the allowance by the justices in the order. See Rex v. Watel, Dougl. 116. ante, Vol. i 63. where this was done.

(4) The justices cannot be compelled to set forth in their order, whether they decide upon the form or the merits. South Cadbury v. Braddon, ante, 466 (1). As to when the court of King's Bench will intend that it was quashed upon the merits, and when for want of form, see post. 470.

the order. The court may likewise confirm an order in part, and quash it as to the remainder; as when a pauper and his children are removed, and the settlement of the pauper appears to be in one parish, and that of the children in another. The court gives costs to the successful party; and in cases where the order is quashed, directs an allowance for the pauper's maintenance, from the time of removal to that of the judgment. An allowance of the appeal is no quashing of the order of two justices, although costs are given (1). If, therefore, the sessions intend, in such case, to decide upon the question of settlement, the original order should be quashed.

Allowing appeal does not quash the original order.

Where necessary to state the grounds of adjudication.

Where an order is quashed generally, that must be taken to be upon the merits (2). It may sometimes be quashed for a defect really formal, but which is so far considered as substance, that it cannot be amended under 5 Geo. II. c. 19. As, where an order is quashed for want of a proper adjudication of the pauper's last legal settlement (3); or upon some other ground not directly connected with the question of settlement; as if the respondents are unable to prove the pauper actually chargeable (4). In such cases the grounds of the adjudication should appear in the order, to prevent the parties being concluded by the judgment, and enable them to try the merits by a fresh order of removal and appeal. (5)

(1) Per Lord Hardwicke, C. J. Rex *v.* Sarratt, Burr. S. C. 73. 2 Bott, 693. Pl. 754.

(2) Per Lord Kenyon, C. J. Rex *v.* St. Andrew's, Holborn, 6 Term Rep. 613. But it seems only to amount to a presumption which may be rebutted by evidence, see Rex *v.* Osgathorpe, post, (4).

(3) See Rex *v.* Andrew's, Holborn, ante, (2).

(4) Rex *v.* Osgathorpe, Burr. S. C. 261.

(5) See post. 480. But if the original order is quashed, and appears defective on the face of it, a special entry seems unnecessary, although it may be safe to make it. For in such a case it shall be intended that it was reversed, for a defect in form. See South Cadbury *v.* Braddon, 2 Salk. 607. and post. 517.

When

When an appeal is dismissed upon the merits, the original order is generally confirmed, because the respondents to succeed must have established all the material facts stated in the order, of which the place of settlement is one. Order to dismiss appeal.

If an appellant succeeds in his appeal against a rate, the judgment is to allow the appeal, and either to quash or amend the rate, as the case requires. If amended, the amendments should be specifically stated in the order. Such as, that the name of some person omitted to be rated be inserted; or that of the appellant, if improperly inserted, be struck out; or that the sum at which any person is assessed be altered; and the order should go on to direct, that this alteration, whatever it be, be made "forthwith" in the rate, by the officer of the court. 2. Form of order on rate. When appeal allowed.

And now by 41 Geo. III. c. 23. sect. 3. the sessions, when a rate is quashed, may direct by their order that the sums assessed on particular persons, or any part of it, shall not be paid, which is necessary in some cases, in order to stop the commencement or continuance of proceedings to enforce payment. May order rate not to be paid.

Also by sect. 8. of the same statute, if the court shall order the names of any persons who have paid the rate previous to the hearing of the appeal, to be struck out of the rate, or their assessments lowered, their order must further direct, that such sums as ought not to have been received by the parish officers shall be repaid by them to the party. [illegible]

If the court are of opinion that the appeal is made without foundation, then judgment is to dismiss the appeal, and confirm the rate. 17 Geo. II. c. 38. s. 6. enacts, "that if, upon appeal from the whole rate, it When dismissed.

should be found necessary to quash or set aside the same, then, and in every such case, the said justices shall, and are hereby required to order and direct the churchwardens and overseers of the poor to make a new equal rate or assessment." But whether this clause is to be considered only as directory, so that an omission of the direction to make a new rate does not affect the order at all; or whether it vitiates it *in toto*, or leaves it valid *pro tanto*, are questions which have not been judicially considered.

Orders cannot be conditional.

The judgment should be direct and positive. An order of sessions drawn up specially, for the purpose of obtaining the opinion of the court, concluded, "and if the court should be of opinion, then," &c. This was held naught; for the justices ought to determine one way or other, and not to make a special conclusion referring to the court; but it was referred to the judge of assize (1). So also where the sessions, upon hearing an appeal against an order of removal, were equally divided in opinion, and stated a case for the determination of the court of King's Bench, but neither affirmed nor discharged the original order; the court of King's Bench refused to give judgment, and sent the case back to sessions, that they might affirm or discharge it. (2)

SECT. V.

Of the Costs and Maintenance to be awarded by the Sessions in Appeals.

8 & 9 W. III. c. 30. Costs on appeals.

The 8 & 9 W. III. c. 30. s. 3. for the more effectually preventing vexatious removals and frivolous appeals,

(1) Anon. 2 Salk. 486.

(2) Rex v. Kniveton, Burr. S. C. 499. See post. 506. (4).

enacts,

enacts, that the justices, at their general or quarter sessions, "upon any appeal before them, there to be had concerning the settlement of any poor person, or upon any proof before them, there to be made of notice of any such appeal to have been given by the proper officer to the churhwardens or overseers of the poor of any parish or place (though they did not afterwards prosecute such appeal); shall, at the same quarter sessions, award to the party, for whom and in whose behalf such appeal shall be determined, or to whom such notice did appear to have been given, as aforesaid, *such costs and charges in the law*, as by the said justices in their discretion shall be thought most reasonable and just, to be paid by the churchwardens or overseers of the poor, or any other person against whom such appeal shall be determined, or by the person that did give such notice as aforesaid." against removals.

The words of the statute seem imperative upon the magistrates, to allow some costs where an appeal is heard, or notice of appeal has been given against an order of removal. Costs usually allowed.

The following case, however, is reported; "A mandamus was directed to the justices to give costs to the party, in whose favour the appeal had been determined." But, upon the return, the court held it reasonable for them to have the power of judging, whether costs should be allowed or not, and quashed the writ of mandamus. (1) Quære, if sessions have discretionary power to award costs.

It

(1) Rex *v.* Justices of Nottingham, 5 Geo. I. 2. Bott. 748. Pl. 841. The subject of this appeal does not appear by the report. But as it was prior to stat. 17 Geo. II. c. 38. which first gives costs in appeals against poors' rates, it seems to have been an appeal against an order of removal. If this be the same case as is reported, Rex *v.* Justices of Nottingham, 5 Geo. II. Sess. Cas. 422. it is there stated to have been an appeal against an order of removal, and that the justices had allowed 30s. for costs and maintenance, and the court only determined, that the justices had a discretionary

It is usual, however, for the sessions to allow some costs. But, as they have a discretionary power over the amount, it is customary to give 40s. unless the case has been accompanied with circumstances of vexation or fraud.

Quære, if costs can be recovered back if order quashed?

It was held by a judge sitting at nisi prius, where the parish officers, against whom costs were awarded, paid them, and afterwards the order of removal was removed into the court of King's Bench by *certiorari*, and quashed; that they could not recover them back again from those by whom they were received, upon an action of indebitatus assumpsit. (1)

Form of order for costs.

An order for costs need not set forth that so much was expended or laid out (2): and the sessions cannot give costs on the mere adjournment of an appeal. (3)

17 Geo. II. Costs in appeal against a rate.

17 Geo. II. c. 38. s. 4. enacts, that in cases of appeals against poor rates, the justices "may award to the party,

cretionary power as to the sum to be allowed, and not that they had power to refuse costs altogether. It is to be observed likewise, that the words of 9 Geo. I. c. 76. which enacts, that the justices shall award the sums intended for the pauper's maintenance, are similar to those of 8 & 9 W. III. c. 30. respecting costs; and it has been determined, that the words of 9 Geo. I. are imperative so as to make it necessary for the sessions to award the costs of maintenance where they have been incurred, and the appeal is allowed, St. Mary Nottingham *v.* Kirklington, post. 476. (2). Ideoquære.

(1) Mead *v.* Death and Pollard, 1 Lord Raym. 742. Decided by Tracy Baron, Chelmsford Lent assizes. Quære, Tamen the reason of this decision. The reporter adds, "But note also, that the costs were paid by the churchwardens and overseers, and this action was brought by the churchwardens alone." And by the opinion of Lord Ellenborough, C. J. "It is a consequence of law, that the money paid upon an order which is afterwards vacated in whole or in part should be refunded by those who have received it, and if it be not repaid, an action for money had and received would lie to recover it back again." Rex *v.* Bradford, Mich. 48 Geo III. 9 East, 97.

(2) This was an order for costs upon 9 Geo. I. c. 7. Maiden Bradley *v.* Wallingford, Fol. 247.

(3) Rex *v.* Stansfield, Burr. S. C. 20.

for

for whom such appeal shall be determined, reasonable costs, the same manner that they are impowered to do in cases of appeal concerning the settlement of poor persons," by stat. 8 & 9 W. III. c. 30.

The word "may" seems to give the court a discretionary power to award or refuse costs to the party for whom the appeal is determined. (1) Quære, if sessions may refuse costs.

But it has been decided, that the quarter sessions have no authority to award costs under this act, unless an appeal has been entered and determined: for the determination of the appeal is a condition precedent to their power to give costs, the words of the act being, "may award to the party for whom such appeal *shall be determined* reasonable costs," &c.; and the subsequent words, "in the same manner as they are impowered to do in cases of appeals concerning the settlement of poor persons," &c. only relate to the mode in which those costs are to be recovered (2). The court, therefore, refused a motion for a mandamus to the justices commanding them to hear evidence, for the purpose of giving costs against one who, having given notice of appeal against a poor's rate, countermanded it the night before the sessions. (3) Cannot award costs, unless the appeal against a rate is tried.

Where the court of quarter sessions give costs to the party appealing against a rate, it should ascertain the precise amount, for if their order directs, that "the costs of the appeal shall be taxed by the clerk of the peace," it is bad as to that particular. (4)

(1) Quære tamen, see Rex v. Barton, 2 Salk. 609.

(2) See post, 477.

(3) Rex v. Justices of Essex, 7 Term Rep. 583.

(4) Rex v. Wargrave, Trin. 13 Geo. III. The costs in this case were in fact taxed by the deputy clerk of peace. But the reason of the determination seems to apply not less to the principal than to his deputy. For which, see ante, 281. n. (5) Rex v. Townsend, ante, 360. (1). and the same point admitted likewise in Rex v. Sweet, Mich. 48 Geo. III. 9 East, 25.

The 8 & 9 W. III. c. 30. extended only to give the *costs and charges in the law* upon appeals against orders of removal. But heavy expences might, and usually were incurred by the parish to which the removal was made, in maintaining the paupers, until the appeal was determined.

Maintenance given 9 Geo. I. c. 7. s. 9.

To remedy this grievance, it was enacted by 9 Geo. I. c. 7. s. 9. "that if the justices of the peace shall, at their quarter sessions, upon an appeal before them there had concerning the settlement of any poor person, determine in favour of the appellant, that such person or persons was, or were, unduly removed, that then the said justices shall at the same quarter sessions, order and award to such appellant, so much money as shall appear to the said justices to have been reasonably paid by the parish, or other place, on whose behalf such appeal was made, for or towards the relief of such poor person or persons, between the time of such undue removal, and the determination of such appeal." &c. (1)

Sessions must award maintenance, and cannot direct it to abide the event of a presumed appeal.

The 9 Geo. I. c. 7. is imperative upon the quarter sessions to allow the costs of maintenance to the appellant, where the appeal is decided for him (2): and the justices cannot direct, that such costs shall abide the event of another appeal.

(1) As to the proceedings to obtain costs, when an order of removal has been suspended, and there is an appeal to the sessions under 35 Geo. III. c. 101. s. 2. see that act, and ante, 326, and note 1. The 9 Geo. I. c. 7. s. 9. empowers the justices at the sessions to allow to the appellant parish, such sums as have been expended in maintaining the persons mentioned in the order, "between the time of the undue removal, and that of deciding the appeal." It seems, therefore, as if the sessions could not, upon allowing the appeal, include, by virtue of this act, a sum paid to the removing parish for maintenance under a suspended order by virtue of 35 Geo. III. c. 101. Sed quære, and that such costs may be made the subject of an appeal. See ante, 387.

(2) St. Mary, Nottingham, v. Kensington, 2 Sess. Cas. 67. See ante, 367.

An

An order of sessions therefore, directing "that the costs of maintenance of the said S. M. since the time of the removal to the said parish of K. shall abide the event of the cause, in case the said parish of G. C. shall think proper, by another order, to remove the said S. M. to the said parish of K., and the inhabitants of K. appeal to this court from the same," was quashed, as to this part, in the court of King's Bench. (1)

Remedy to compel sessions to give cost.

If the sessions refuse to give costs where the statute is imperative upon them to do so (2); or if, having a discretionary power to grant or deny them, they refuse to hear evidence to guide that discretion (3), the remedy is by application to the court of King's Bench for a mandamus, commanding them to allow costs in the first case, and to hear evidence in the second. And it is said, that this mandamus should not be presented to the justices at large, but to those who were present at the sessions when the appeal was heard. (4)

Remedy to compel party to pay costs. 1 Where by distress.

As to the means of recovering costs awarded by an order of sessions: 8 & 9 W. III. c. 30. s. 3. enacts, in case of appeals against orders of removal, "that if any person ordered to pay such costs shall live out of the court's jurisdiction, it shall and may be lawful for any justice of the peace of the county, &c. wherein such person inhabits, upon request, and a true copy of the order for the payment of such costs produced and proved by some credible witness upon oath, by his warrant under hand and seal, to cause the money, mentioned in

(1) Rex v. Great Chart, Burr. S C. 194.

(2) St. Mary, Nottingham, v. Kirklington, ante, 476. (2).

(3) See Rex v. Justices of Essex, ante, 475. (3).

(4) Rex v. Justices of Nottingham, 1 Sess. Cas. 432. where a mandamus is said to have been quashed for this exception, after a return had been made to it.

that

that order to be levied by distress and sale of the person's goods that is ordered, and ought to pay the same; and if no such distress can be had, to commit such person to the common gaol of that county or liberty, there to remain twenty days."

The 17 Geo. II. c. 38. refers to the same method for the recovery of costs upon appeals against rates (1). In both instances, the legislature has confined the remedy by distress to cases where the person ordered to pay costs lives out of that court's jurisdiction by whom the order was made. (2)

Remedy by indictment.

But it has been held, that an indictment will lie for disobedience to an order of sessions, whereby costs are directed to be paid by the defendant, upon dismission of his appeal to a poor's rate (3); as also that the act, concerning costs, extends to the limited jurisdiction of St. Alban's. (4)

(1) See Rex *v.* Justices of Essex, ante, 47– (3) But Rex *v.* Byce, 1 Bott, 332 Pl. 362 seems contra.

(2) Rex *v.* Boys, Say Rep. 108. ibid. 143.

(3) Rex *v.* Boys, Say. Rep. 108. Upon a motion to quash the indictment, S. P. determined upon demurrer to the same indictment, Rex *v.* Boys, Say Rep 143 S. C. by the name of Rex *v.* Byce, 1 Bott, 332 Pl. 362.

(4) Rex *v.* Boys, ibid.

CHAPTER XXXIX.

Of the Effect of an Adjudication by the Sessions, upon an Appeal against an Order of Removal.

IT has been already shewn, that an order of removal, unappealed from, concludes the parish upon which it is made as against the world, unless it be *ex facie* void. (1)

Effect of an order unappealed.

Also, if the sessions, upon appeal, confirm an order of removal by two justices, it is final upon the parish charged as to all parishes whatsoever. But where they discharge an order of two justices, it only binds as between the contending parishes. (2)

Of an order confirmed.

The effect of this rule is, that parishes which are ordered to keep paupers, in the two first cases, cannot remove them elsewhere, and must receive them from any other parish, unless they can prove a subsequent settlement.

Effect of the rule upon settlements.

But an order quashed on an appeal is only conclusive between the contending parishes. The respondent parish, therefore, may send the same paupers to any other parish (3), and such third parish may send them back to the parish to which the first order of removal was made.

Order quashed, only conclusive between the contending parishes.

(1) Ante, 126. et seq. ib. 207.

(2) Per Lord Hardwicke, C. J. Rex v. Sarratt, Burr. S.C. 73. 2 Bott, 693. Pl. 754. Harrow v. Rislip, Salk. 524. post. (3).

(3) Harrow v. Rislip, 2 Salk. 524. 2 Bott, 690. Pl. 748.

For,

For, per Lord Hardwicke, C. J. — An order of reversal is conclusive only on the parishes concerned, and not on all other parishes: this is reasonable; for a third parish may be able to give better evidence than had been given by the former parish; and why should one parish be concluded by the insufficiency of the evidence given by the other? It may be collusive; it is at least *res inter alios acta*, and should only bind the contending parties. (1)

Adjudication of session only conclusive when made upon the merits.

But the session's decision upon an order of removal, even between contending parishes, is conclusive only where it expressly decides the fact of the pauper's settlement. If the order is quashed for want of form, the same parish may remove a second time to that which has succeeded in the appeal. (2)

Instances appeal allowed, but original order not quashed.

Thus where two justices removed a pauper from S. to B.; B. appealed to the sessions, and the appeal was allowed, because the inhabitants of S. did not produce the order, and S. was ordered to pay costs. It was held that two justices were not precluded, by the allowance of this appeal, from again removing the pauper from S. to B. For the sessions only allowed the appeal, and an allowance of the appeal is no quashing the order of the two justices. The sessions only declare that the appeal was proper, but they give no judgment one way or other (3), *i. e.* upon the pauper's settlement.

(1) Cirencester *v.* Coln St. Aldwins, Burr. S. C. 17. Mynton *v.* Stoney Stratford, 2 Salk. 527. Swanscombe *v.* Shenfield, ib. 492. Rex *v.* Bentley, Burr. S. C. 425. Rex *v.* Bradenham, Burr. S. C. 394. Beddingham *v.* Kingston Bowsey, Carth. 516. That an order quashed is conclusive between the contending parties. Rex *v.* Leigh, Cald. 59. And see ante 207, et seq.

(2) Rex *v.* Bishops Walton, Fol. 275. Rex *v.* St. Andrew's, Holborn, 6 Term Rep. 613. Where the first order was quashed for a defect in the adjudication of the pauper's settlement.

(3) Rex *v.* Sarrat, Burr. S. C. 73.

So

So also where the pauper, a certificate man, was removed before he was actually chargeable; and the order was appealed from, and discharged generally by the sessions. He was removed a second time; and the sessions, upon a second appeal, confirmed the second order, and stated specially, that the pauper had come into the parish under a certificate, and that the former order was had before the pauper became chargeable; but that, at the time of making the second order, he was become actually chargeable. The court affirmed these last orders of the justices and the sessions; for the two sessions' orders are very consistent with each other. The former sessions might discharge the former original order, because the paupers were not actually chargeable: and the latter sessions might confirm the latter original order, because they were become actually chargeable. *Per* Lee, C. J. —The court are not at liberty to presume rights accruing subsequently, unless they do appear; but here it does appear the right did plainly accrue subsequently, by their actually becoming chargeable. (1)

Order quashed because a certificate man was removed before chargeable; a subsequent order removing him, when chargeable, to the same place is good.

(1) Rex v. Osgathrope, Burr. S. C. 261

CHAPTER XL.

Of removing Orders in the Court of King's Bench, and quashing or confirming them there.

SECT. I.

Of suing forth the Certiorari.

Certiorari may be granted by the court of King's Bench.

"IT seems agreed at this day, that regularly the court of King's Bench, having a general superintendency over all other courts of criminal jurisdiction, whether they be of an ancient or newly created jurisdiction, may award a *certiorari*, as well as the court of Chancery, to remove the proceedings before any such court, unless the statute or charter which creates them expressly give them an absolute judicature exempt from such superintendency. (1)

To remove orders original. Upon appeal.

Original orders therefore made by one or by more justices, and those made by a court of sessions, either upon appeal or by original jurisdiction, may be removed by writ of *certiorari* into the court of King's Bench, unless the jurisdiction is taken away by express and positive words. (2)

It

(1) 4 Hawk. P.C. 144. Book 2. c. 27. See Rex *v.* Morely, 2 Burr. 104. Rex *v.* Eaton, 2 Term Rep. 89. Rex *v.* Sparrow, ib. 196. n. Rex *v.* J. Jukes, 8 Term Rep. 542: and see Cates qui tam *v.* Knight, 3 Term Rep. 442.

(2) As to appeals against rates and overseers' accounts, 43 Eliz. c. 2. provides, that the order of the justices in sessions shall "conclude and bind all the parties;" and 17 Geo. II. c. 38. s. 4. directs, that "they (i. e. the justices) shall hear and finally determine

It is in the discretion of the court in term-time, or of a single judge in vacation, to grant or refuse a *certiorari* (1). During term-time, it is granted by the court, upon motion of counsel (2). But in vacation, a *fiat* for a *certiorari* may be allowed at chambers by any of the judges of the court of King's Bench. (3) How applied for.

Previous to moving the court, or applying to a judge, the party who sues it forth must give six days notice thereof, in writing, to the justice or justices, or two of them (if so many there be), before whom such proceedings have been, to the end that such justices, or the parties therein concerned, may shew cause, if they think fit, against issuing the *certiorari*. (4) Six days' notice.

This notice must be served six days prior to the application to the court of King's Bench for the writ of *certiorari*; for if the court should grant a rule to shew cause, six days notice of that rule will not be sufficient (5). A similar notice is necessary to be served, previous to an original application to a judge at chambers for his *fiat*. (6) Must be previous to motion for the writ.

mine the same." 9 Geo. I. c. 7. s. 8. uses the same words, viz that the justices shall "finally determine" appeals against orders of removal. But the superintending jurisdiction, by the court of King's Bench, is not taken away in any of these cases, see post. 488.

(1) Anon. 7 Mod. 118. Arthur v. Commissioners of Sewers in Yorkshire, 8 Mod. 131. Rex v. Eaton, 2 Term Rep. 89. And see Rex v. Justices of Glamorganshire, 5 Term Rep. 279.

(2) Rex v. Steers, 1 Barnard. K. B. 96.

(3) Rex v. Newton, Burr. S. C. 157. This is often necessary, in order to bring the party within the six calendar months allowed for suing out the writ by 13 Geo. II. c. 18.

(4) 13 Geo. II. c. 18.

(5) Rex v. Justices of Glamorganshire, 5 Term Rep. 279. 2 Bott, 754. Pl. 859. Rex v. Nicholls, ib. n. 1.

(6) See Rex v. Newton, ante, (3).

Notice on whom.

Where proceedings are to be removed from the session, this notice is usually served upon two of the justices, whose names stand in the caption of the session, as having been present there.

On the justices making the order.

Where an order remains with the justices who made it, they must be served with notice in like manner. (1)

On the sessions.

But when the original order has been returned to the quarter sessions (2), or removed thither upon appeal, it is sufficient to serve notice upon the justices at sessions, for that will warrant a *fiat* for a *certiorari* as to the order of sessions; and if the writ commands them to return that order, they should return the original order, upon the appeal from which the order of sessions was made (3), and its effect is to remove all proceedings relating to the subject previous to the return, although some of them may have originated after the teste. (4)

By 13 G. II. c. 18. s. 5. must be sued for within six months.

The 13 Geo. II. c. 18. s. 5. further enacts, "That no *certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings, before any justice of the peace, or the general or quarter sessions, unless it be applied for in six calendar months after such proceedings had or made."

When in time.

If the rule for a *certiorari* be moved for during term, or the judge applied to for his *fiat* in the vacation, on the last day of the six calendar months, it is sufficient to warrant

(1) See the opinion of Chapple, J. Ibid.

(2) Per Holt, C. J. Anon. 1 Salk. 456. ante, 132.

(3) Rex v. Newton, ante, 483. (3).

(4) Rex v. Battams and others, 1 East, 298. where it was held that an indictment found at the quarter session, between the teste and return of the certiorari, ought to have been removed under it.

rant its issuing (1). Likewise, where an order of sessions is made upon appeal, from an original order of two justices, it seems that an application, within six months after making the order of sessions, entitles the party to remove the original order along with it, although the latter was made before that time. (4)

When not. Also, if a *certiorari* has been applied for in time, but is afterwards quashed for a defect in the return, it does not seem to warrant the party to apply for a new writ after the six months are expired. (3)

5 Geo. II. c. 19. of the recognizance. 5 Geo. II. c. 19. enacts, that no *certiorari* shall be allowed, unless the party prosecuting it (4), before the allowance thereof, enter into a recognizance, with sufficient sureties, before a justice of the county, or place, or before the justices at sessions, where such judgment or order shall have been given or made, or before a justice of the King's Bench, in 50l. with condition to prosecute the same, at his own costs and charges, with effect, without wilful delay, and to pay the party in whose favour the judgment or order was made, within a month after the same shall be confirmed, his full costs, to be taxed according to the course of the court where such order shall be. And if he shall not enter into such

(1) Rex v. Newton, ante, 483. (3)

(2) Ibid. The case does not state this expressly. But as the application to remove both orders was made on the same day, which is mentioned to be the last day of the six months after making the order of sessions upon appeal, the original order must have been made more than six months. See also Rex v. [illegible], Str. 470. In granting a certiorari to remove an order of the justices, for the removal of a pauper, quære, whether the six months are to be counted from the day of making the order, or from that of executing it, by which the time for appealing is regulated; see ante, 398.

(3) Ut videtur. Rex v. Newton, ante, 483. (5)

(4) See Rex v. Boughey, 4 Term Rep. 281.

recognizance, or shall not perform the conditions, the justices may proceed to make such further order, for the benefit of the party for whom the judgment shall be given, in such manner as if no *certiorari* had been granted; the said recognizance to be certified into the King's Bench, and there filed with the *certiorari*, and order or judgment removed thereby.

When entered into.

According to the words of the statute, it seems unnecessary to enter into this recognizance, previous to applying for the *certiorari*. It is sufficient if it be entered into at any time before it is allowed.

Party removing an order, must enter into recognizance, although he ought not to be liable for costs.

Sometimes it may be expedient that a party should remove orders, and enter into a recognizance, although he ought not to pay costs, if the court should ultimately decide the case against him.

Thus, in an appeal from an order, removing to the parish of A. from the hamlet of C., the sessions quashed the original order, and stated a case. The clerk of the peace had in his minute-book and book of orders, entered that the order had been confirmed, subject to a case. The parish of A. were obliged to remove the orders, to prevent their being concluded by this false entry of the officers. The recognizance was accordingly entered into by them, and the *certiorari* moved for by the name of the King *v.* the Inhabitants of A. The clerk of the peace made his return according to the truth of the fact, stating that the order of two justices had been quashed by the sessions. To prevent the expences of the recognizance, and the burthen of costs falling upon A. in the event of their not succeeding, a rule was obtained to shew cause, "why the *certiorari*, lately returned into the court with the orders, should not be considered to have issued at the expence of the hamlet

 of

of C., and also why they should not enter into a recognizance to pay to the inhabitants of the parish of A. their full costs and charges, to be taxed according to the the course of the court, if the order made by the quarter sessions against the said hamlet of C. shall be confirmed." This rule was made absolute without opposition. (1)

When these requisites have been complied with, the application must be made upon an affidavit of the person suing forth the writ, and also of others, where it is necessary, that they should join in making one. (2) Of the affidavit.

It must state, first, that six days' notice has been given; 2d, *The date* (2) and substance of the proceedings to be removed, and before whom they were had, including the mention of a case when granted; 3d, If any other facts are necessary to shew irregularity in the proceedings of the justices or sessions, and to induce the court to grant the writ, they should be inserted. (3) Its form.

Application being thus made for a *certiorari* upon such an affidavit, it is usually granted, in the first instance, Of granting the certiorari.

(1) Rex *v.* Inhabitants of Ashton Underhill, and Rex *v.* Inhabitants of Charlton, Cald. 416.

(2) The affidavits for the certiorari are entitled, "in the King's Bench," without giving any name to the cause. In all sessions' cases, the King is the prosecutor, and the parties against whom the last order in the cause is made, are the defendants. Thus, if two justices remove a pauper from Stroude to Lidney, and the sessions on appeal confirm the order, the title of the case is, "The King against the Inhabitants of Lidney." If they quash the original order, it is "The King against the Inhabitants of Stoude." See the advertisement prefixed to Burr. S. C. Also if an appeal is against a rate, and the sessions confirm it, the title is, "The King against Hogg" (the appellant). If they quash the rate; "The King against the Inhabitants of St. Nicholas, Gloucester" (the place for which the rate is made). See Cald. 262. and ib. 267. Cases thus entitled.

(3) See, Rex *v.* Newton, Burr. S. C. 161.

(4) See Rex *v.* Justices of Glamorganshire, 5 Term Rep. 279. Rex *v.* Eaton, 2 Term Rep. 89.

stance, by the court or judge, if a case has been reserved at the sessions for the opinion of the court of King's Bench, or if any palpable irregularity appears to have taken place on the proceedings. Otherwise, the court only grants a rule to shew cause, in which case a copy of the rule must be duly served upon the magistrates, who have been served with six days' notice previous to the original application; and if the court so direct, upon the parties interested in the orders made. The justices or parties interested may shew cause against the rule on the day given them; and if they do, the court decide whether it ought to issue. (1)

Of serv the rule

If no one appears to oppose the rule, it is made absolute upon affidavit that it has been served upon the proper parties. This service must be either by delivering a copy to the party in person, or by leaving one with an inmate at his place of abode, and, at the same time, shewing the person served the original rule issued by the proper officer of the court.

Grounds for refusing the rule

There are certain grounds upon which the court always refuse the rule, and which, among others, may be shewn for cause why it should not issue.

1st, Six month elapsed, &c

These are, 1st, If the previous circumstances already stated to be necessary have not been complied with; or if six months have elapsed between the date of the proceedings sought to be removed, and that of moving for the writ. (2)

2d, Appeal not determined.

2d, By a general rule of court, no *certiorari* shall be be granted to remove an order of justices, from which the

(1) As to the form of proceeding upon a rule to shew cause, see ante, 114

(2) 13 Geo. II. c. 18 ante, 184.

law has given an appeal to the sessions, before the matter is determined on the appeal, because it hinders the privilege of appealing; and if any order be removed before appeal, it shall be sent down again. (1)

This rule, however, extends only to cases where there is a limited time for appealing; as, otherwise, the order never could be removed. (2) Exception to this rule.

Also, if a party has the exclusive right of appealing, he may waive the privilege, and remove the proceedings at once into the court of King's Bench. Party may waive it.

"For where an order of justices is made, and there is but one party who hath a right to appeal (as in cases of orders of appointment, and of orders made upon an overseer's absence, or negligence in the execution of his office), and he waves his privilege of resorting to the sessions, and elects to come to this court, a *certiorari* lies for removing the order, there being no reason against the party's being relieved; for the authority of this court is never taken away by an act of parliament, without special words therein for that purpose. But where there are two parties having a right to appeal, and the time of appealing, being fixed by the law, as in the case of settlements, where the time is limited to the first session, it is not reasonable to grant a *certiorari* till the time is elapsed; and so is the rule in Salk. 147. to be understood." (3)

(1) Regula Generalis, Salk. 147. But it is said that advantage must be taken of this rule, upon the motion to file the order, for if filed it is too late. Per Holt, C. J. Rex *v.* Shallington, 1 Salk. 137. But by Lord Hardwicke, C. J. "Where an appeal lies, a certiorari granted may be taken off the file." Rex *v.* Harman, And. 343.

(2) Rex *v.* Borough of Warwick. 2 Str. 991. post. 490. Rex *v.* Harman, ante, (1). Rex *v.* Houlditch, 2 Bott, 753. 856.

(3) Rex *v.* Harman, And 343. Rex *v.* Houlditch, supra, (2).

It

Pending an appeal.

It seems further, that if a *certiorari* issues pending an appeal, and before the sessions have determined the case, it may be quashed. (1)

But if a defendant appeals to the sessions against an order of maintenance, and his appeal is dismissed, because it should have been made to the preceding sessions, the original order may be removed by *certiorari*, and the court will give judgment upon it, and also upon that made at sessions. (2)

3d, When the case clear

3d, The court will not grant a *certiorari*, to remove proceedings, where it appears clear that the justices were warranted in doing what they did. (3)

4th, Not remove poor's rate.

4th, The poor's rate cannot be removed by *certiorari*, as it would prevent the collection of the rate, and the poor must remain unprovided for, while the case is depending in the superior court. (4)

But it lies to remove all orders made by the magistrates concerning it. (5)

(1) Rex *v.* Sparrow, 2 Term Rep. 196 n. a.

(2) Rex *v.* Stanley, Cald. 172.

(3) Per Lord Kenyon, C.J. Rex *v.* Justices of Glamorganshire, sed quære, if it is not otherwise where the justices at sessions state a case for the court's opinion.

(4) Reg. *v.* St. Mary the Virgin, Marlborough, 2 Str. 932. Rex *v.* Uttoxeter, ib. 2 Bott, 293. Pl. 284. Cunn. 28. more full. Per Ashhurst, J. Rex *v.* King, 2 Term Rep. 235. Also an original rate having been made at sessions prior to 17 Geo. II c. 38. the court refused to remove it by certiorari. Rex *v.* Justices of Shrewsbury, 2 Str. 975.

(5) Rex *v.* Wavell, Doug. 116. and several cases, post. Appeal from a poor's rate; and the sessions ordered the churchwardens to produce the books at an adjourned day, before which a certiorari was brought to remove that order; and held to lie, though the appeal is depending; else the order must be obeyed before the validity of it can be determined. Case of the Borough of Warwick, 2 Str. 991.

5th,

5th, It is settled, that a *certiorari* does not lie to remove any other proceedings of magistrates, than judicial acts. (1)

5th, Nor any but judicial acts.

Although a *certiorari* has been allowed to issue, and a return has been made and filed, yet the court will supersede it where it appears to have issued improvidently, and will order the return to be taken off the file (2), and grant a writ of *procedendo*. (3)

Court will supersede certiorari.

But a party cannot, after the return is made, and the proceedings removed, object to the issuing of the *certiorari*, if he has enlarged the rule to shew cause why the proceedings should not be quashed. (4)

When party concluded from objecting.

It is to be observed, that the restrictions upon issuing a writ of *certiorari*, to remove orders of justices, do not apply to cases: 1st, When any officer of the crown is affected by the order, and the attorney general sues for the writ on the part of the crown (5). 2d, When a party, in whose favour an order has been made, wishes to remove it into the court of King's Bench, with a view to enforce the execution of it (6). 3d, When such a party is desirous of removing a defective order, for the purpose of quashing it, and thus to give the justices an opportunity of making a valid one. (7)

Motions for a certiorari not within these rules.

(1) Rex *v.* Ledιard, Say. 6. Rex *v.* Lloyd, Cald 339.

(2) Rex *v.* Eliz. Nicholas, 2 Str. 1227. Rex *v.* Wakefield, 1 Burr. 488. and many other cases.

(3) Per Holt, C. J. Reg. *v.* George, 6 Mod 40.

(4) Rex *v.* Hartshorne, 2 Burr. 745.

(5) Rex *v.* Tyndal and others, East. Term, 27 Geo. II.

(6) Rex *v.* James, Mic. 26 Geo. III. Rex *v.* Read, Trin. 45 Geo. III.

(7) Rex *v.* Winpenney, East. 35 Geo. III.

In

In these cases the order may be removed after the expiration of six months. Notice to the justices is not required, nor is any recognizance for the payment of costs necessary.

SECT. II.

Of the Form of the Writ of Certiorari.

Of the directions of the certiorari.

THE writ must be directed to the person in whose custody the records to be removed are. This is, in general the inferior court itself, and not the officer whom they entrust to keep them.

How directed to sessions.

"In the case of orders, made by justices of peace, or at the sessions, it is directed either to the justices of the peace for the county generally, or to some of them in particular by name, and not to the *Custos Rotulorum*, although he has the custody of the records. (1)

To a justice.

If an order remain in the hands of a justice of peace, or has been sent by him to the clerk of the peace, it ought to be certified on a *certiorari* for the removal of it by such justice only. But where it is made a record of sessions, it must be certified as one of their records. (2)

When to sessions.

The sessions returned into the court of King's Bench an order of two justices, for the removal of J. S. It was objected,

(1) 4 Hawk. P. C. Book 2. chap. 27. Pie v. Thrill, Hob. 135.

(2) 4 Hawk. P. C. 162. Book 2. ch. 27. sec. 65. Justices who retain an order or conviction made by them, may be compelled to return it to the sessions, by a writ of man[illegible]

objected, that the *certiorari* should have gone to the two justices, and not to the sessions, because it did not appear any act had been done at sessions, either to confirm or reverse the order. But the court held, that the order was well returned by the sessions. And Eyre, J. said, it had been so determined already; for the justices are supposed to return all the orders they make to the sessions, where they are to be recorded. (1)

Likewise, where an order remains in the hands of the person to whom it is directed, such as an order of appointment, the *certiorari* must be directed to him. (2) When to the person appointed.

Care should be taken, that the proceedings to be removed are properly described in the writ. For, "if there be a variance between the *certiorari* and the record removed, the justices need not certify such record (3)." Likewise, if they do return records under it, the court will give no judgment upon such as are improvidently removed, but will quash the *certiorari*. (4) Orders removed must be described;

Thus where five orders, touching the removal of a pauper, his wife and children, were removed by *certiorari* from the sessions; the court were of opinion, that the four first were not properly described in the *certiorari*, (there being a variance in the words "his" and "their" children); the fifth order was well removed, being rightly described; but was given up as a bad one, being made whilst the matter was depending before the sessions. Therefore, they quashed the last order of justices which or court will quash the writ.

(1) Rex v. Warminster, 1 Str. 470. Fort. 326.

(2) Rex v. Inhabitants of Great Marlow, 2 East, 244.

(3) Dalt. Just. Peate, chap. 159, page 674 ed. 177?

(4) But after the certiorari is quashed, a second may issue to remove them. See Rex v. Hedingham, Sible. Burr. S. C. 114. Rex v. Newton, ib. 157.

was

was well removed, and quashed the *certiorari* as to the four other orders, which were not well removed by it, for want of being properly described. (1)

SECT. III.

Of returning the Certiorari.

Returned by those to whom directed. Writ directed to the justices, returned by clerk of the peace, ill.

THE *certiorari* must be returned in the name of the persons to whom it is directed, or some of them. Thus, where two orders were removed by *certiorari*, the return was quashed; because the return in the schedule, annexed to the writ, was not made by two justices, but by the clerk of the peace, who was not the person to whom the *certiorari* was directed, and, thereupon, a new *certiorari* was granted (2). If the writ is improperly directed, the proper parties may object to make any return for that reason; but, if they return the record, no third person can object, and move to quash the *certiorari* on that account. (3)

(1) Rex *v.* Hedingham, Sible. Burr. S. C. 112. This point is thus reported, And. 73. Orders were made to remove "A. B. and E. his wife and two daughters, the children of A. B. and E. his wife." The certiorari is to remove all orders for the removal of "A. B. and E. his wife, and the children of A. B.;" and it was held by the court, that for this reason the orders were not removed.

A certiorari issued to remove all orders concerning the inhabitants of the parish of Barking, Needham Market, and Darmesden Hamlets, and the orders mentioned Barking and Needham, and Darmesden hamlets, without *market*. Holt, C. J. If Needham and Needham Market be the same hamlet, so it should have been returned; but we cannot take notice that there is no such hamlet as Needham Market. If trespass quare clausum fregit at Needham were brought, and the plaintiff found a breaking at Needham Market, he must be nonsuit. Regina *v.* Inhabitants of Barking, 2 Salk. 452.

(2) Eliz. Ashley's case, 2 Salk. 479.

(3) Daniel *v.* Philips, 4 Term Rep. B. R. 499.

Where

Where a *certiorari* issues to the sessions, the record may be certified by two of the justices (1); and the practice, in many instances, seems to have been so (2). But it is laid down, "that all *certioraris*, though directed to divers justices, may be returned by one, and so is the usual practice (3)." And, where it was moved to quash a return to a *certiorari*, directed to two justices of the peace, because it was only made by one, the court overruled the exception (4). It seems unnecessary to sign the return; but the person who makes it, must describe himself as one having authority to do so. A *certiorari* issued to bring up an original order of removal by two magistrates, and an order of sessions made thereupon: it was objected to the *certiorari*, that it did not appear to be properly returned; the return was only signed R. Whitton, not saying who, or what he was, or that he had any proper authority to return it. It is not even prefaced to be the answer of such a one, which is the usual method. Lee, Chief Justice, directed other returns to be looked into, which appeared to run thus: "The answer of A. B. and C. D. two of the justices within named;" and then desired the counsel to look into it, and see if it could be supported. But they finding it could not, moved to quash their own *certiorari*. (5)

By how many justices to be certified. By one.

Form of the return.

The return must be made upon parchment (6); and if on paper, it will be quashed as no return. (7)

On parchment.

(1) Reeve *v.* Brown, 1 Keb. 282.

(2) Rex *v.* Newton, Burr. S. C. 159.

(3) Per Astry, Anon. Comb. 25. and the form of the writ is so.

(4) Rex *v.* Darlington, 1 Barnard. B. R. The practice in Surrey is, to make the return in the name of the chairman of the sessions, to whom the writ is brought, or supposed to be brought, but without stating him to be the chairman, only saying "one of the justices within named." It is signed but not sealed.

(5) Rex *v.* Newton, ante, (2).

(6) Rex *v.* Darlington, ante, (4).

(7) Rex *v.* Stow Barden, Cas. Temp. Hard. 173.

It

As to the seal.

It is laid down by Hawkins "that every return ought to be under the seal of the inferior court, or of the justice or justices to whom it is directed; and, if such court have no proper seal, it seems that the return may be well made under any other (1)." Also, the form of the writ requires the return to be made under seal. It is said, however, in a recent case, that a return to a *certiorari*, to remove an indictment for a misdemeanour from the sessions, need not be under seal, notwithstanding the words of the writ. (2)

Can return nothing but the order.

The justices have no power by the *certiorari* but to return the order *in hæc verba*, and therefore, what they think fit to return further, the court can take no notice of. (3)

Must do it according to the purport or tenor, as directed by the writ.

Where on a *certiorari* to remove an order, the return was *cujus quidem tenor sequitur in hæc verba*, and not *qui quidem ordo sequitur in hæc verba*, it was quashed for that reason. (4)

But where the *certiorari* is only to remove and send up the tenor of the record, it must be obeyed accordingly. (5)

When delivered.

A *certiorari* is of no effect, unless it be delivered before its return is expired. (6)

(1) Hawk. P. C. 161 Book 2 chap 27 sect 65.

(2) Rex v. Pickersgill, Cald 297.

(3) Weston Rivers v. St Peters, in Marlborough, 2 Salk. 492 post 502. (4)

(4) Reg. v. St Mary's in the Devizes, 1 Salk. 147

(5) Dalt. ed. 1727. Chap. 195. 674. 4 Hawk. P C. 163 Book 2 chap 27 sect 71. But the distinction seems to be that the word "tenor" imports only a true copy Reg v. Drake, Salk. 660. and the cases there cited, but the term "ordo" means the original order.

(6) Rex v. [illegible], 1 Keb 944. 4 Hawk. P.C. c. 8, 16 sect. 59

If

If the person to whom it is directed do not make a return, the modern practice is to issue a rule to return the writ of *certiorari*, and if that rule be not obeyed, to grant an attachment against the party disobeying. (1) An alias, &c.

If a *certiorari* be not returned, so that an *alias* be awarded, the return must be upon the first writ, and the other must be returned, *quod ante adventum istius brevis*; the matter was certified. (2)

The person to whom a *certiorari* is directed may make what return to it he pleases, and the court will not stop the filing of it on affidavits of its falsity, except only where the public good requires it; as in the case of the commissioners of the sewers, or for some other special reason: but regularly, the only remedy against such a false return, is an action on the case, at the suit of the party injured by it, and information, &c. at the suit of the king (3); as also by attachment for the contempt, where the party refuses to make a return. (4) The remedy for a false return.

The general practice as to the return of a record from the sessions, by writ of *certiorari*, is as follows: Practice as to returning certiorari.

The attorney for the party, who applies for the writ, receives it from the crown office as soon as the rule of court or judges' *fiat* has been obtained, to warrant the issue. He then carries it along with the recognizance to

(1) See Rex *v.* Battams, 1 East, 298. The ancient practice is said to have been to issue an alias, that is, a second writ; then a pluries, that is, a third writ, or causam nobis significes was awarded, and then an attachment. 1 Burn. Just. Tit. Certiorari, cites Crom. 116. and see Cork *v.* Baker, 1 Str. 63.

(2) Anon. 1 Vent. 75. Note, this seems to refer to a case, where the record has been actually certified before the issuing of the second writ, but not returned into the crown office.

(3) 4 Hawk. P. C. 162. Book 2. chap. 27. cites Reg. *v.* Norton, Pasch. 11 Ann.

(4) Supra, (1).

prosecute, acknowledged before a judge, or some justice of the peace, for the county or place where the order was made, to the clerk of the peace; who, when a case has been granted, draws up at length on parchment, a record of the order of sessions, in conformity to the entries which have been made in the sessions-books respecting it. It commences with the caption, and terminates with the case; but the names of the justices, who made the original orders appealed against, are generally omitted in the caption. (1)

Record how drawn up.

The return in the case of a rate is prepared in a similar manner. And, as the rate itself cannot be removed, the entry of the appeal should include the title of the rate, and the allowance by the justices. (2)

[illegible]

The practice as to making the return, seems to vary in different counties. At some sessions, the clerk of the peace makes an indorsement on the back of the writ, as follows: "The answer of A. B. one of the justices within named." "The execution of this writ appears in certain orders to the same writ annexed." Opposite to this indorsement is affixed a seal, supposed to be that of the magistrate in whose name the return is made. The order of sessions, and the original order of the magistrates, which are directed to be removed, together with the recognizance to prosecute the writ with effect, are then annexed to the writ. (3)

According to the form in Burn's Justice, the officer should make out a schedule on a separate piece of parchment,

(1) Ante, 467. (3). But see an order of sessions stating a case for the opinion of the court, signed and sealed by the two justices only who made the first order, (an order of removal,) although many others were named in the caption of the quarter sessions. Rex *v.* Sowerby, Burr. S. C. 125.

(2) Ante, 490.

(3) Such is the practice in the office of the clerk of the peace, for the county of Surrey.

ment, containing the justice's return of his execution of the writ, to which it must be annexed. The records which are required to be certified, are then enclosed within the schedule, and sealed up. (1)

But whatever form is followed in certifying the return, the orders are annexed to the *certiorari*, and the clerk of the peace sends the return up by some person, in whom he can confide, (usually the agent for the party who has sued out the *certiorari*,) who must deliver it to the proper officer at the crown office. How remitted into B. R.

SECT. IV.

Of proceeding to quash or affirm Orders, after they are returned into the Court of King's Bench.

After the return has been thus made by the clerk of the peace into the crown office, a motion is made to file the orders. (2) Of filing the order.

The party, wishing to have them quashed or confirmed (3), moves the court, upon an office copy of the orders procured at the crown office, for a rule to shew cause, why it should not be done accordingly. (1) Moving to quash.

(1) See 1 Burn's Just. Tit. Certiorari, with which the form for the return to a certiorari to remove an indictment as stated in Lambard's Eirenarcha, Tit. Processes, agrees.

(2) Rex *v.* Nether Heyford, Burr. S. C. 479. But this motion is not made in court, the signature of counsel being considered as an authority to the officer. The reason for the motion is, to give the party an opportunity of objecting to the return before filing, if he thinks proper.

(3) In Rex *v.* Oulton, Burr. S. C 68. a motion was made to confirm the orders, unless cause should be shewn to the contrary. before the last day of term; two terms being elapsed since they came in, and nothing done upon them.

(4) See Rex *v.* St. Issey, Burr. S. C. 826, &c. Rex *v.* Moor Critchell, 2 East, 66. where the form of the rule stating the objection to the order is given.

 This

Drawing up the rule.

This rule must be drawn up, and a copy served upon the opposite party.

down for argument.

Formerly, the motion to make this rule absolute was moved as part of the ordinary business of the court, upon any day which suited the counsel's convenience, after that appointed for shewing cause by the rule. But Lord Mansfield introduced it as a standing order, "that all rules, to shew cause why orders should not be quashed, should be peremptory rules, and the causes be set down in the crown paper; and that a copy of the orders should be left with the junior judge of the court, two days before such day for shewing cause (1)." By a subsequent regulation, the court directed, that a copy of the orders should be delivered to each of the judges, two by the clerk in court for the prosecutor, and two by the clerk in court for the defendant. (2)

Crown paper days.

These cases are now set down by the clerk of the rules on the crown side of the court, in the crown paper, to be argued on the day given for shewing cause by the rule, being a crown paper day, that is one of those days in term, which the court has set apart to hear arguments in criminal cases, prior to all other business. They are every Wednesday and Saturday in term, except the first and last day.

Delivering copies to the judges.

The clerk of the rules on the crown side of the court, and the clerk in court employed for the prosecutor, make each a copy of the record removed, one of which is delivered at the chambers of the chief justice, and the other at those of the senior puisne judge, two days before the case comes on for argument. The secondary and

(1) 13 Feb. 1775. Burr. S. C. 806. (2) Trinity term, 11 Geo. III.

clerk

clerk in court, employed for the other side, make, and deliver in like manner, one to each of the junior judges. It is likewise proper for *both* parties to furnish *all* the four judges with an abstract of the points upon which it is intended to impeach, or support the orders. (1)

The case being thus set down in the cause-book, upon the crown side of the court, is called on in turn. If counsel appear only to support the rule, and the clerk in court, on his side, has delivered the paper-books to the judges, he may move to have it made absolute, upon affidavit of service (2), but not otherwise (3). If none appear for the rule, or no paper-books have been delivered on that side, and the other side are ready to oppose it, the rule is of course discharged, and the order of removal affirmed. But if neither are present, the court order the case to be struck out of the paper. Of the argument.

Usually, however, both parties appear, and then the case is first gone into by the counsel who shew cause against the rule, or in other words, assign their reasons why the conditional rule, granted to the party removing the order, ought to be discharged (4). After the counsel on that side have been heard in succession, beginning with the first in rank, those on the other side are heard in like manner, in support of the rule. The judges, if they see no difficulty in the case, deliver their opinions, usually

(1) Mich. 45 Geo. III. Lord Ellenborough, C. J. with the concurrence of the other judges, desired that this should be done in future, in all arguments upon the civil side of the court.

(2) This being to reverse the act of a court of record, is not considered as a matter of course.

(3) Rex v. Inhabitants of Disburgh, Mich. 43 Geo. III. Rex v. Walpole, St. Peter's, Burr. S. C. 638.

(4) It is called a conditional rule or rule nisi causa, &c. because it is granted to the party moving for it, unless sufficient cause be shewn against it, upon a day given for the purpose by the court, in the rule.

seriatim, and pronounce judgment directly after the argument. But, if the case appears to require further consideration, they direct it to stand over, either for another argument, or their own more mature deliberation; or else they desire it to be sent back to the sessions, to have the facts more fully stated.

Of the points to be argued.

The points which may be taken in argument, relative to orders removed into the court of King's Bench, are, 1. Such as originate in objections to the *certiorari*. 2. In defects arising upon the face of the orders removed by it. 3. Upon the law as it arises from the facts stated in a special case, to be grounds of the judgment given in the court below.

1. If the orders are improperly removed by the *certiorari*, the court will give no judgment upon them, but quash the *certiorari*. (1)

2. It has been shewn that orders made by justices, both in and out of sessions, may be removed by *certiorari*, although no case has been stated for the opinion of the court of King's Bench. (2)

Court only enter into errors on the proceedings.

Where orders are so brought up, the court can only consider such errors as appear on the face of the proceeding, and will hear nothing of the merits, the order of sessions being in such case final (3); and if any thing is returned with the *certiorari*, in addition to the orders, they will take no notice of it. (4)

Also

(1) Rex *v.* Hedingham, Sible, Burr. S. C. 112. Rex *v.* Newton, ib. 157.

(2) Ante, 482.

(3) Anon. 1 Vent. 310. 2 Bott, 745. Pl. 833.

(4) Weston, Rivers and St. Peter's, in Marlborough, 2 Salk. 492. Rex *v.* Oulton, Burr. S. C. 68. ante, 499.

(3). This seems uniformly true, where a special case has been reserved by the sessions; but in orders of appointment, where no case has been reserved,

Also, if a fact appears doubtful on the face of the order, they will intend that the sessions have done right. (1)

If a fact be doubtful B. R. intend the sessions to be right.

And where such a general order is removed, the court cannot send it back to the sessions. (2)

Two orders of sessions, touching an order of removal, had been brought up without the justices having stated a case; it was moved that the orders might go back to the sessions, in order for them to be at liberty to amend the order of sessions, upon an affidavit stating, that the original order of two justices was not in fact discharged upon the merits (which were never entered into,) but quashed upon an apprehended mistake in form. The court gave a rule to shew cause why the order of sessions, discharging the original order of two justices, should not be rectified and made agreeable to the truth of the case. On shewing cause, an affidavit was produced by the other side, denying that the order was quashed for want of form. The judges held it doubtful, upon the affidavit, "whether it was discharged upon the merits, or quashed for want of form;" and therefore clearly and unanimously held, "that the court could do nothing in it." (3)

Will not send back an order to be rectified, on affidavit, without consent.

But the court of King's Bench, where a material fact appeared doubtful on the face of the order, has directed

Will direct inquiry when a material fact

served, the court has admitted affidavits to be read, stating a want of jurisdiction, or other illegal conduct in the magistrates, to invalidate them. See Rex *v.* Great Marlow, 2 East, 244. Ante, vol. i. 54. Ib. 36. Rex *v.* Overseers of Bridgewater, Cowp. 139. 1 Bott, 26. Pl. 44.

(1) Rex *v.* Mayfield, Burr. S. C. 453. Rex *v.* Normanton, ib. 213. But see post. 504. (3). Rex *v.* Margam.

(2) Rex *v.* Normanton, ante, (1).

(3) Rex *v.* Bradenham, Burr. S. C. 394. 2 Bott, 735. Pl. 823.

seems doubtful.

the court of quarter sessions to inquire into the facts, and state them fully to the court, although they had not stated a case (1). Thus, where "two justices removed a pauper from Langunwd to Margam by an order in which they adjudged him to be settled in Margam, by virtue of a certificate *under the hands and seals of L. R. churchwarden*, and H. T. overseer of Margam, and A. P. and S. W., justices of the peace, and attested by two witnesses. The parish of Margam appealed to the next sessions *at Glamorgan*(2), where the order was affirmed, on hearing the merits. These orders being removed here by *certiorari*, this court, in Hilary term, 1786, directed the sessions to state the number of overseers and churchwardens of Margam, at the time of granting the certificate. In answer to this rule, the court of sessions represented to the court of King's Bench, that they could not state the same without producing witnesses on both sides, which they did not conceive themselves authorized to do, without the further directions of the court of King's Bench. In Hilary term, 1787, the court of King's Bench ordered the court of sessions to examine into and certify the number of churchwardens and overseers of the poor, at the time of giving the certificate in 1741, and to examine and hear such evidence as should be produced by the parties to those facts. To this rule the justices returned, "that at the time of giving the certificate, there were two overseers and four churchwardens in Margam." (3)

Of the power of B. R. over rates; only where there is an appeal.

The jurisdiction of the King's Bench over poor's rates is nearly similar to that which they exercise over orders of removal. But as the rate cannot be removed by

(1) Rex v. Cuckfield, Burr. S. C. 295.

(2) i. e. for Glamorgan shire.

(3) Rex v. Margam, 1 Term Rep. 775. by three judges.

cer-

certiorari (1), the court of King's Bench do not exercise any power over it, until after it has been appealed against to the quarter sessions. Then, as the order made by the sessions, upon appeal, contains a copy both of the title of the rate and the allowance, if that is removed, the court not only exercise a direct jurisdiction over the order of sessions, but a collateral authority over the rate and allowance, as matters touching and concerning the same. It does this whether the sessions state a case for its opinion or otherwise. (2)

"This was a rule to shew cause why a rate for the relief of the poor of the parish of Effingham, in the county of Surrey, and an order of sessions confirming the rate, should not be quashed, on the ground that the parties applying for the rule were over-rated and over-charged. The court of quarter-sessions had refused to state a special case; but the counsel for the appellant being of opinion that the rate would appear to be bad from the title, they removed it (3) by *certiorari*, and obtained the present rule. The title of the rate was as follows: "Surrey to wit. An assessment on all and every the occupiers of lands and houses, in the parish of Effingham, for the necessary relief of the poor, *and towards payment of money borrowed for repairing and rebuilding the workhouse.*" The court being of opinion that as the rate appeared, from the title, to be made to raise money for an illegal purpose, it could not be supported; and made the rule absolute. (4)

B. R. exercise jurisdiction over rates, although no case stated.

But the court, in conformity to their proceedings upon orders of removal, will not examine into any thing but

B. R. only examine into what appears on the

(1) Ante, 490. ib. 498.

(2) But if no case is stated, the objection must appear upon the face of the order. See infra.

(3) i. e. not the rate, but the order of sessions reciting the title.

(4) Rex *v.* Wavell and others, Doug. 116. Ante, vol. i. 63.

what

order, where no case. what appears on the face of the order of sessions. A poor rate was made in October, 1789, and allowed in the November following; against which the defendant appealed to the ensuing Easter sessions, when the appeal was dismissed with costs, because it was not made to the next sessions.

The rate (1) and order of sessions having been removed into the court of King's Bench by *certiorari*, it was moved to quash the rate, for an informality appearing on the face of it, as having been made by one overseer only; it being competent to the party, complaining of the rate, to take advantage of any defect which appeared on it, notwithstanding the sessions had properly dismissed the appeal, because it had not been lodged in time. The proceedings below are now before the court, and they will not suffer a rate, which is allowed to be apparently illegal, to be confirmed here. But by Buller, J.—Here the party objecting to the rate, is not entitled to remove it; and as the order of sessions is right, we cannot do otherwise than confirm it. *Per Curiam*, Order of sessions affirmed. (2)

When case stated. 3. But the most usual way in which these orders come before the court, is when they are made subject to a case stated for its opinion. (3)

Sessions must adjudge. It is been already shewn, that the court below must make an order one way or other, and cannot adjourn the appeal into the superior court, accompanied by a case which states the facts only. (4)

(1) So in the report.

(2) Rex *v.* Atkins, 4 Term Rep. 12. 1 Bott, 284. Pl. 276.

(3) Ante, 464. Rex *v.* Kniveton, Burr. S. C. 499.

(4) But the court of King's Bench will give judgment upon every order which sets forth the facts and reasons upon which it is made, whether it be made subject to their opinion or not. See ante, 472, (2). Rex *v.* Netland, post, 507, (1).

 Where

Where a case is agreed at the sessions to be drawn up for the opinion of the judge of assize, and he has given it after hearing counsel, the court will not, afterwards, enter into consideration of the matter, if the orders, containing the case, are removed by *certiorari.* For, by Lord Mansfield,—Here is a manifest consent of the parties to this reference to the judge, both parties having, by their counsel, been heard before him, and therefore this is, like all other references, by consent. If the determination of the judge of assize should not, in the present case, be final and conclusive, it would be adding to the trouble and expence of this sort of litigation, which is already too expensive. The rule was discharged for this reason, without entering into the merits. (1) B. R. will not decide upon a case which has been before the judge of assize.

Yet where a case was referred to the judge of assize, *and an order made by the sessions upon his opinion,* but the appeal had not been continued by regular adjournments until his determination was known, the court quashed the order of sessions, and affirmed the original order of the two justices. (2) Otherwise, if no adjournments until his determination.

If a case is imperfectly stated, so that the court cannot give judgment upon the orders, it may be rectified in any of the following ways: Of rectifying imperfect state of a case.

1st, The orders may be quashed by consent of counsel on both sides, in which case the parties must begin *de novo*; and it may be made part of the rule, that the parish, to which the first removal was made, shall accept of a new original order of removal, and not remove the paupers back till the merits of the said settlement be determined. (3) 1. By quashing the order.

(1) Rex *v.* Natland, Burr. S. C. 793.

(2) Rex *v.* Hedingham, Sible, Burr. S. C. 112. Ante, 466. (4).

(3) Rex *v.* Himley, Burr. S. C. 115. Rex *v.* Martley, ib. 120. Rex *v.* Deddington, ib. 220.

2d, A

2. Fact inserted by consent.

2d, A fact may be inserted in the case under a rule obtained by consent, to amend the order. (1)

3. Inserted in the rule by admission of counsel.

3d, A fact may be admitted by counsel at the bar during the argument. But, in order that the opinion of the court may not appear upon its records to be given on a case different from that upon which it was really founded, it must be made part of the rule by which the orders are quashed or confirmed, that such particular facts (setting them forth) were so admitted by consent of counsel. (2)

4. Sent back to be re-stated.

4th, The court may send the case down to be re-stated, either by consent (3), or by their own authority.

Grounds for remitting it.

The general reasons which seem to induce the court of King's Bench to remit a case to be re-stated, are, 1st, where some material fact is omitted, or nothing but evidence is set forth (4); 2d, Where the facts are so stated that the court cannot give judgment upon the question submitted to them (5); 3d, Where it appears by the case that the merits have not been examined into by the court below, either through an improper rejection of evidence (6),

(1) Rex *v.* Great Chart, ib. 194.

(2) See the form of the rule. Rex *v.* Llandverras, ib. 573. A copy of a court roll of a manor was read in court by consent. Rex *v.* Warblington, 1 Term Rep. 241.

(3) Rex *v.* Nether Heyford, Burr. S. C. 479.

(4) Rex *v.* Friendsbury, Burr. S. C. 644. Rex *v.* Bray, ib. 682. Rex *v.* Bilsdale Kirkham, ib. 828. which are cases of orders of removal. Rex *v.* Hill, Cowp. 613. Rex *v.* Hogg, Cald. 266. and the opinion of Buller, J. ib. 512. cases upon rates.

(5) See Rex *v.* Hitcham, Burr. S. C. 489.

(6) Rex *v.* Bramley, 6 Term Rep. 330. Rex *v.* Little Lumley, 6 Term Rep. 157. But in Rex *v.* Prosser, the order of sessions confirming a rate was quashed, where it appeared from the case, that a witness had been rejected improperly.

or

or some other erroneous opinion entertained by the magistrates. (1)

The court, however, does not seem to have laid down any very decided rule for sending back cases; especially if they are enabled to collect enough for what is stated to warrant a decision upon the question submitted to their judgment. No very decided rule.

Thus it appeared by a case, that the court of sessions had rejected evidence. The court of King's Bench were of opinion, that they ought to have received it; but thinking likewise, that, if admitted, it could not vary the conclusion of fact drawn by the magistrates, they refused to send the case back, as it would only produce more litigation and expence, and quashed the orders (2). So, where the sessions had stated evidence, instead of finding a particular fact, the court were of opinion, that it would have been more regular for them to have done otherwise. But as the justices had, in effect, drawn the right conclusion, and could not, upon the premises, draw any other, the order was confirmed upon the foregoing reason, of avoiding expence and litigation (3). Also, in one instance, *an order of removal*, and order of sessions confirming it, were quashed, because the case was imperfectly stated. (4) B. R. will not remit where fact is immaterial to their judgment.

Likewise, where sufficient facts are returned in the case, the superior court will not send it down to be re- B. R. will not remit for defect

(1) Rex *v.* Newbury, 4 Term Rep. 475. where a case was sent back to be re-heard, when the sessions had quashed a rate upon a point relating to the practice of their own court, although the court of King's Bench were of opinion, that their practice was right.

(2) Rex *v.* Nutley, Burr. S. C. 701.

(3) Rex *v.* Shebbeare, 1 East, 7.

(4) See Rex *v.* Luffington, Burr. S. C. 232. Rex *v.* Dudley, 6 Term Rep. 53.

stated.

appearing by affidavit.

stated, upon a suggestion, supported by affidavit, that the statement, thus returned up, is contrary to the facts as they appeared at the hearing. (1)

Nor in cases upon rates.

Also, where a case was stated respecting a poor's rate, the court thought they could not send it back to the sessions, unless for a defect appearing on the face of it. (2)

" The appellant was rated *for the farm and lands* 32*l.*; *for the iron and coal-mine* 70*l.*" The iron mines not being rateable, the court of King's Bench was pressed to send the case back to sessions to ascertain the proportion at which they had been rated with the coal-mines, and to amend the rates by deducting it from this conjoint assessment. But the court thought, that not having any means to ascertain the several proportions at which the iron and coal-mines had been rated, they could do nothing else than quash the order of sessions, which, having confirmed the rate generally, was wrong at all events. (3)

Also, where the sessions quashed a rate, and it appeared to the court of King's Bench, that a large tract of rateable land was not assessed therein, the order of sessions was confirmed (4). But where the sessions confirmed a rate, and the court of King's Bench was of opinion, that certain burgesses, who occupied lands as tenants in common, had been improperly omitted; the rate (*i. e.* the order of sessions) was sent back to have the rate amended by the insertion of the burgesses occupying the land. (5)

(1) Rex *v.* Burgh in the Marsh, Burr. S. C. 745. Pl. 828. and see Thackham *v.* Findon, 2 Salk. 489. ante, 503. (3).

(2) i. e. of the case, Rex *v.* Coode, 2 Bott, 276. Pl. 270.

(3) Rex *v.* Cunningham et al. 5 East, 478. and see Rex *v.* Leeds and Liverpool Canal Company.

(4) Rex *v.* Aberavon, 5 East, 453. ante, 301.

(5) Rex *v.* Watson, 5 East, 480.

Like-

Likewise, when the parish officers gave no evidence respecting the amount of the property rated, as tithe rent and composition, the court sent the case back to be re-heard, re-considered, and re-stated. (1)

The court not only send down an order, generally for the purpose of being re-stated, but, where they judge it necessary, remit it, with special directions, inserted in the rule, by which it is sent down, commanding the justices at sessions to enquire into and state particular facts. (2)

B. R. remit an order with direction to sessions to make certain inquiries.

Likewise, if the court are dissatisfied with the new case, they will remit it back a second time to the court of session for further inquiry. (3)

B. R. remit a case a second time.

SECT. V.

Of the Manner of sending down a Case to be re-stated, and how the Sessions are to proceed.

Where a case is sent down to the sessions to be re-stated, the form of proceeding used to be, before the regulations that rules *nisi* for quashing orders should be peremptory, to grant a rule to enlarge the former rule, for shewing cause why the order sent up should not be quashed.

Ancient form of re-writing orders.

(1) Rex *v.* Topham, 12 East, 546.

(2) Rex *v.* Clifton upon Dunsmore, where the case arose upon an order of removal. Burr. S. C. 697. Rex *v.* Hogg, a case stated upon a poor's rate, Cald. 266. See also Rex *v.* Margam, 1 Term Rep. 775 ante, 504. (3).

(3) See Rex *v* Bray, Burr. S. C. 682. Rex *v.* Clifton upon Dunsmore, ib. 697. Rex *v.* Margam, ante, (2).

quashed, and also that it be referred back to the justices of the peace in and for the county, to state the fact, or to hear fresh evidence, &c. as the case might be (1). The rule also ran. that the orders (describing them which were removed by *certiorari*) be sent back to sessions (2), and further, that the sessions do afterwards return the same to the court (3). But the modern practice has been to make a rule that the orders, returned with the writ of *certiorari*, be sent back to the sessions to be re-stated, sometimes adding the particular point upon which the court wishes for information.

Modern practice.

This rule, together with the original record, is delivered by the clerk of the rules to which ever side applies for it; usually the attorney for the party whose interest it is to have the facts re-stated. They are then carried back, and lodged by him with the clerk of the peace; and the appeal is, thereupon, entered in the list of appeals for the ensuing sessions.

Inquiry at sessions, a new trial.

Where the inquiry directed to be made respects a matter of fact, the rehearing is considered in the nature of a new trial. The parties must, therefore, proceed as if it were an entire new business, and prove the whole of their case over again as they did originally, without taking notice of what passed before. (4)

But

(1) See Rex v. Nether Heyford, Burr. S. C. 479. Rex v. Kniveton, ib. 499. Rex v. Clifton upon Dunsmore, ib. 697.

(2) Rex v. Kniveton, ante, (1). Rex v. Hitcham, Burr. S. C. 489. Rex v. Clifton upon Dunsmore, ante, (1). Rex v. Page, 2 Bott, 736. Pl. 825.

(3) Rex v. Nether Heyford, ante, (1).

(4) Rex v. Page, 2 Bott, 736. Pl. 825. where the court so highly resented the behaviour of the justices in refusing to hear evidence, as to declare, that if any body would move for an information against them, they would certainly grant it. See also Rex v. Bradley,

But where remitted for informality, sessions not to hear evidence

But it is said, that where a case is sent down for informality only, the sessions must not even hear new evidence. This was holden where a majority of the justices, at the second sessions, were not present when the original case was stated at the former one. (1)

Manner of re-hearing appeals

Cases are so rarely remitted back by the Court of King's Bench for inquiry, that rules to regulate the mode of proceeding upon this second hearing of appeals can scarcely be considered as established by the settled practice of any court of sessions.

Of the notice, &c.

But, as it has been compared by the judges to proceedings upon a new trial, it seems as if the appellant ought to serve a fresh notice, in the same manner as the plaintiff is obliged to do, where the record goes down a second time, to have the cause re-tried by a jury. (2)

Of the continuance.

It seems, also, that the court of sessions must enter continuances, from the sessions at which the case was originally stated, down to that at which it is re-heard, in obedience to the rule of court (3). This appears more necessary, as there is no continuance from the inferior to the superior court (4). Further, it has been held in one case, that an order of sessions, imperfectly stated, and sent back to be re-stated, is quite out of the case, upon the return of the second order, and a perfect

v. Bramley, 6 Term Rep. 330. 2 Bott, 743. Pl. 831. S. P. But that it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information. Rex *v.* Justices of Seaford, 1 Black. Rep. 432.

(1) Rex *v.* Bray, Burr. S. C. 682.

(2) See Mr. Tidd's Practice of the King's Bench, vol. ii. 824. 3 ed.

(3) See Rex *v.* Yarpole, 4 Term Rep. 71. and the cases cited, ante, 424. (3).

(4) 1 Tidd's Practice, 3rd. ed. 349.

 nullity.

Should be a new case.

nullity (1). In strictness, therefore, the sessions ought to make a new order, and a second case should be signed by counsel, and the record drawn up by the clerk of the peace, in the same form as that which was originally returned into the Court of King's Bench. The sessions may, possibly indeed, by reference to the first special case, so far incorporate it with the second as to make it part thereof; but the most regular and better way is, to draw it up as is before stated.

Sessions may make an order contrary to the former.

Upon this re-hearing, the court of sessions may make an order diametrically opposite to that which they had first made. Thus, if the first order of sessions allowed the appeal, and quashed the original order, the second may dismiss the appeal, and confirm the original order. (2)

Motion to quash this order on its return.

After the sessions have re-stated the case, a record is to be drawn up, and sent to the crown office by the clerk of the peace, in the same manner as that originally returned. A motion is then made in the Court of King's Bench for a rule to shew cause why this re-stated order, and (where necessary) the original order, should not be quashed (3). The case is set down, as before, by the clerk of the rules for the crown side of that court, to be argued on the day mentioned in the rule. But where the order of sessions, last returned, differs in the judgment from that first sent up, the party who was formerly represented by the crown then becomes the defendant (4),

(1) Rex v. St. George's, Southwark, Burr. S. C. 283.

(2) Rex v. St. George's, Southwark, Burr, S. C. 283.

(3) Rex v. Bath Easton, Burr. S. C. 777. Rex v. Bilsdale Kirkham, ib. 833. But quære, whether this was necessary, where the original rule had been enlarged, unless possibly where the sessions had made a different order. See ante, 512. (1).

(4) Ib. and see Rex v. Kniveton, Burr. S. C. 499.

and

and the motion to quash the order must be made by counsel on that side. (1)

SECT. VI.

Of the Judgment of the Court, and Costs thereupon.

I. Of the court's judgment.

When the case is thus completely stated and argued, the court proceed to give judgment. The judgment.

They have not only an appellant but an original jurisdiction over the orders removed. For if an order of removal, or any other, is returned into the Court of King's Bench, after the time for appeal has elapsed (2), it may be quashed or confirmed. This may be done also where there has been an appeal, although the sessions have exercised no jurisdiction over the order, but dismissed the appeal for other reasons. (3) Jurisdiction for B. R. over orders removed

It does not seem absolutely necessary, in some cases, for the Court of King's Bench to exercise any jurisdic- Jurisdiction when more orders than

(1) It is unnecessary for the party who obtains the certiorari, to enter into a second recognizance, where the case is returned back to the king's bench under a rule of that court. But quære, whether, if the second order of sessions reverses the first, and the parish who thus become defendants resist it upon the return, they must not enter into a recognizance to secure the opposite party his costs. See the form of a motion in a case nearly similar, Rex *v.* Ashton Underhill, Cald. 418. ante, 487. (1).

(2) Rex *v.* Sutton St. Nicholas, Burr. 276. and ante, 488.

(3) Rex *v.* Stanley, Cald. 172. Where, in an order of bastardy, the court quashed the original order of adjudication as defective, and confirmed the order of sessions, dismissing the appeal against it.

 tion

tion over an original order, from which there has been an appeal to sessions. Thus, if an order of sessions quash the justices' order, and the order of sessions is affirmed, there is no occasion to pronounce any judgment upon the original order, because it remains quashed by that which was made at sessions. So, if an order of sessions confirm an order of two justices, and the order of sessions is affirmed, it seems unnecessary for the superior conrt to confirm the original order, because it remains in force, as being confirmed by the sessions upon appeal.

B. R. quash or affirm all orders properly removed before them.

The Court of King's Bench exercise an authority over all orders, whether original or appellant, when returned before them, with the writ of *certiorari*, and either quash or confirm them, however they have been dealt with at sessions. The reason of this seems to be, that all orders removed by *certiorari* remain for ever after upon the files of the court. They must, therefore, like all other judicial proceedings, derive their power to bind the subject, from being the acknowledged act of that court in which they remain recorded, and for this purpose the court makes some order respecting them. This practice is highly beneficial to parties who are interested in orders thus removed, as the court will grant an attachment if their orders are disobeyed. (1)

Whenever the court is of opinion, therefore, that an order of sessions is good, they not only discharge the rule to shew cause why it should not be quashed, but proceed and give judgment of affirmance, without which the party would not be entitled to his costs.

Order confined to terms of original rule.

This judgment does not extend beyond the terms of the original rule, to shew cause why the orders mentioned therein

(1) See the opinion of Holt, C. J. Reg. *v.* West, 2 Lord Raym. 1157. ante, 168.

therein should not be quashed or confirmed. Thus, if the rule is only to quash the order of sessions, and the original order of justices is untouched by that order, the court do not proceed to deal with such original order upon that rule. (1)

Exception.

But it has been held, that although there may be a slight impropriety in not moving to quash the original order, yet if the order of sessions, although not expressly, does in effect confirm it, a motion to quash the order of sessions is sufficient to enable the court to examine the original order, and quash or affirm it upon such a rule. (2)

It has been already shown, that the court will give no judgment upon an order, unless regularly removed before them. (3)

Form of rule when original order not removed.

When the justices at sessions, therefore, do not return the original order, as well as their own order made upon the appeal, it is not usual to mention such original order in the rule *nisi* to quash, because it is not before the court. But if the sessions have affirmed the original

(1) This remark does not extend to quashing or confirming an order in part, where the rule refers to an entire order.

(2) Rex *v.* Stanley, Cald. 172.

(3) Ante, 493. (4), 502. (1). The rule by which orders are reversed or affirmed is thus laid down, in South Cadbury *v.* Braddon, 2 Salk. 607. 2 Bott, 745. R. 834. "If the sessions reverse the first order, and that being removed appears to be good, this court must intend it was reversed on the merits, and affirm the order of sessions. If the sessions reverse the first order, and that being removed appears not to be good, we must intend it was reversed for form, and affirm the order of reversal. So, if the sessions affirm the first order, and that appears to be good, we must affirm the order of sessions; but if the first order appears bad, and the sessions reverse it, this court must reverse it, because it appears naught." But these observations apply to orders, where no reason is assigned for the judgment, and no case is stated.

 order,

order, and the court is of opinion that they have done wrong, by quashing the order of sessions, it has been generally understood that the original order also stands quashed (1). If the sessions have discharged the original order, and the court is of opinion that they have done wrong, by quashing the order of sessions, it has been understood that the original order stands good.

But when the original order is returned with the writ of *certiorari*, the court usually notices it in their judgment.

Of order when both orders removed.

When, therefore, the order of sessions affirms the original order, and the court affirm the former, they likewise affirm the latter. They also quash the original order, when that by which it is confirmed at sessions is quashed (2).

But

(1) This seems to demonstrate, that the justices ought to return all orders affecting the matter in question, whether original or otherwise, under the certiorari, which the writ in effect commands them to do.

(2) Rex *v.* Hacheston, Burr. S C. 287. Road *v* North-Bradley, 2 Str. 1168. Rex *v.* Sutten St. Nicholas, Burr. S. C. 276. This point was questioned in the following case. An order of removal was confirmed upon appeal. Both orders being afterwards removed into K. B. they were quashed for a defect of jurisdiction apparent on the face of the original order, as not stating the justices who made it to be justices of the peace for the county. It was moved in the term after the court quashed the orders, that this rule might be altered, by omitting such part as relates to quashing the original order of the two justices; and that the same may only order, that the order of sessions made in confirmation of the original order of the two justices may be quashed, and that the justices below may be ordered to enter a continuance to next sessions. The object of this rule was to enable the appellant parish to apply to the sessions for the expence of maintenance; which by 9 Geo. I. c 7. s. 9. could only be allowed by the sessions on appeal, and an adjudication by them that the pauper was unduly removed. Which judgment would now be obtained; their former erroneous opinion being now corrected by the court's decision; and Rex *v.* Yarpole, post. 520.(1) was cited as warranting the motion. The motion was opposed in the first instance, and many cases were cited both antecedent and subsequent to Rex *v.* Yarpole, where the confirmatory order of sessions being quashed, the original order

But the practice of quashing the original order does not seem to extend to cases where the merits of the appeal have not been properly tried at sessions, through the mistake or misconduct of that court; for that would deprive the appellant of the advantage of litigating the facts upon which the original order is founded, without any assent or fault on his part. In such case the court do not quash the order, but direct the sessions to enter a continuance to the next sessions, and re-hear the appeal.

Original order not quashed if the sessions have not decided on the merits.

An appeal against an order of removal was properly lodged. Upon the hearing, the justices at sessions, being divided in opinion, affirmed the order by a majority of eight to seven; but subject to a case, whether three of the justices, who voted for the affirmative, had a right to join in the judgment. It being admitted that the order of sessions could not be supported, it was moved to quash both orders; but Lord Kenyon, C. J. said, that it could not be done, as no judgment for quashing the original order was entered in the rolls of the sessions. If the court of sessions had quashed instead of confirming the original order, there would have been no difficulty; but the parties cannot come here *per saltum*; and as no judgment for quashing the order of justices was given at the sessions, we as a court of error cannot do what the court below should have done. We must make that part of the rule absolute, which has for its object the quashing of the order of sessions, and direct the justices below to enter a continuance to the next sessions, which appears to be necessary from a case in 2 Strange, when

order was likewise quashed by the court of King's Bench. The court gave no judgment upon the point, but refused a rule to shew cause, upon the ground that the party applied too late. Rex *v.* Moor Critchell, 2 East, 66. Ib. 222. But see Rex *v.* West Cranmore, post, 526. (2).

 they

they may decide it; and the court ordered this accordingly. (1)

B. R. affirms the original, when appellant waives the merits.

But where the appellant might have gone into the merits of his case at sessions, but chose to rely upon a point of form, the court have said they will presume he had no merits, and will affirm the original order, instead of sending it back to be re-heard.

The sessions quashed an original order, for that the adjudication was only, that the paupers *have* become chargeable. The court of King's Bench were of opinion, that the words "*have* become chargeable," import, that they were so at the time of making the order of removal, and quashed the order of sessions. But they refused to send the case down for the sessions to go into the merits, Lord Mansfield observing, that it did not appear there were any merits, and probably were none; for if there had been any, the parish would have relied upon them, instead of taking the objection they had done, and the court affirmed the original order. (2)

B. R. quash where order extra-judicial.

If the sessions make an extra-judicial order, as if they confirm (3) or quash (4) an order of removal, where there is no appeal against it, the court usually quash the order of sessions.

Secus if sessions have no jurisdiction.

But where an order is made by a sessions, which has no authority whatever over the subject matter of it, the superior court has refused to take notice of the order.

(1) Rex v. Yarpole, 4 Term Rep. 171. I have ventured to give this meaning to the case, but the argument of the learned judges seem to go further.

(2) Rex v. Honiton, Burr. S. C. 680.

(3) Rex v. Sutton St. Nicholas, Burr. S. C 276. Godalming v. St. Michael's in Winchester, ib.

(4) Road v. North-Bradley, 2 Str. 1168. Anon. 2 Salk. 479.

An

An appeal against an order of removal was made to a borough sessions, who affirmed the order, and stated a case for the opinion of the court of King's Bench. The court agreed that the borough sessions had no jurisdiction to make this order of confirmation, and therefore their opinion and their order were both nugatory. The appeal ought to be to the quarter sessions of the county: as no such appeal has ever been made, the original order stands. The rule to shew cause why it should not be quashed must therefore be discharged, which was done accordingly, and the original order of removal confirmed, without noticing that made by the borough sessions. (1)

1. Form of orders in B. R. upon orders of removal.

The usual form in which the court delivers its judgment, are, 1. If the orders are all the same way, either to discharge the rule and affirm the orders (2), or to make the rule absolute and quash the orders. (3)

2. If several orders differ in their adjudication, it is either that the order of sessions be affirmed, and the order of justices quashed (4); or, that the order of justices be affirmed, and the order of sessions quashed. (5)

(1) Rex *v.* East Donyland, Burr. S. C. 592.

(2) See Alton *v.* Elvetham, Burr. S. C. 425.

(3) See Rex *v.* Ilmington, Burr. S. C. 566.

(4) Rex *v.* Lower Swell, Burr. S. C. 436. It is observed by Sir James Burrow, that where the rule for quashing an order of sessions, by which the original order of justices was quashed, is discharged, the court do not pronounce any reversal of the order of two justices, because that consequently remains quashed, if the rule for quashing the order of sessions be discharged. Rex *v.* North Owram, Burr. S. C. 145. But there are many subsequent orders in his book, in which he states, that the original order was quashed by the court, although the order of sessions, by which it was also quashed, had been confirmed. It has been suggested to me, by a very experienced officer of the court, that the reason for this may be, that in the latter cases the original orders had been removed by the writ of certiorari, in the others, not.

(5) Rex *v.* St. Peter's in Worcestershire, Burr. S. C. 25. the form of the order.

3. Where

3. Where there are several orders made by justices, and several by the sessions, in contradiction to each other, the court quash and affirm some of each, according to their opinion of what is required by the case (1); and here the party moving the rule, if he succeeds in quashing any one order, has his rule made absolute up to that extent, and discharged as to the remainder.

Quash and affirm in part.

The court will likewise quash an order in part, and affirm it as to the remainder. (2)

Also, where an original order is quashed, for a defect appearing on the face of it, the ground of the judgment is stated in the rule. (3)

2. In the case of a rate.

The judgment in the case of rates is, if the rule is discharged, to confirm the order of sessions confirming the rate (4), or to affirm the order of sessions quashing the rate (5); or, where the rule is made absolute, to quash the order of sessions confirming the rate (6); in some cases also, the order has been to quash the order of sessions and confirm the rate. (7)

(1) See Rex v. Osgathorpe, Burr. S. C. 261. Rex v. Braddenham, ib. 398. Rex v. Hinxworth, Cald. 42.

(2) See instances, Rex v. Normanton, Burr. S. C. 213. Rex v. Headcorn, ib. 253. Rex v. St. Mary, Lambeth, 6 Term Rep. 615.

(3) See Rex v. Moor Critchell, 2 East, 222.

(4) Rex v. Matthews, Cald. 1. Rex v. Butler, ib. 94. Rex v. Rodd, ib. 147. Rex v. Hogg, ib. 266.

(5) Rex v. Sandwich, Cald. 145.

(6) Rex v. Prosser, 4 Term Rep. 17. 1 Bott, 285. Pl. 277. Rex v. Sillis et al. Cald. 524.

(7) Rex v. Beeding, Cald. 90. Rex v. St. Nicholas, Gloucester, ib. 262. I have been enabled, by the kindness of Messrs. Dealtry and Barlow, to examine the rule-book and files in the crown office, respecting these cases, and I find the rules to be as here stated, although the rate itself was returned in neither case. The present practice is, as is stated, ante, 517. i. e. not to mention any proceeding in the rule nisi, or in the court's order, which has not been returned before them with the writ of certiorari. Of course nothing is said as to the confirmation of the rate, as it cannot be re-

As

As all cases, whether upon orders of removal, appeals against rates, or overseers' accounts, &c. come originally before the court upon motion, their judgment is given in the shape of a rule (1), and entered as such in the rule book. (2)

Judgment is by a rule.

If the Judges do not come to a decision upon the case within the term, the rule stands enlarged until the ensuing one; and it has been made a proviso in such an adjournment that the costs of maintaining the pauper should attend the event of the cause. (3)

The court, when a case has been disposed of, or struck out of the paper, from evident circumstances of mistake, will sometimes permit it to be restored (4), or mentioned again (5) during the same term.

When viewed.

But where it was moved to have an alteration made in their judgment the term ensuing that in which it was given, they have denied the motion as being too late. (6)

moved. I find upon search, that both the rule nisi and order were merely to quash the order of sessions in Rex *v.* Wavell, East, 19 Geo. III But it is reported in Doug. that the rule nisi, and the judgment thereon went *to quash the rate*, as well as the order of sessions confirming it. Doug. 116. ante, 505. Inconvenience might possibly arise in some cases, from not quashing the rate itself. As suppose an order of sessions affirms a rate; if the order of sessions is quashed only, the rate seems to stand good. But if any mischief were likely to ensue from the present practice, perhaps the court of King's Bench would remit the order back to the sessions, and direct them to enter continuances, and quash the rate there.

(1) See the form Rex *v.* St. Peter's in Worcestershire, Burr. S. C. 27. Rex *v.* Moor Critchell, 2 East, 222.

(2) See Burr. S. C. 595. and the preface by Sir James Burrow to his S. C.

(3) Overnorton *v.* Salford, 1 Black. Rep. 436.

(4) Rex *v.* Empingham, Burr. S. C. 791.

(5) Rex *v.* Wintersett, Cald. 298.

(6) Rex *v.* Moor Critchell, ante, (1).

II. Of

Of the costs.

II. Of the costs.

If the party who removes the order succeeds in obtaining the judgment of the court, he is not entitled to costs; but if his rule be discharged, he must pay them as taxed by the master of the crown office (1). For 5 Geo. II. c. 18. enacts, "that if the order or judgment shall be confirmed by the court, the person entitled to the costs, for the recovery thereof, within ten days (2) after demand made, upon oath of such demand, and refusal of payment, shall have an attachment granted for the contempt, and the recognizance not to be discharged till the costs are paid, and the order complied with."

Attachment for.

No costs when certiorari quashed.

But if the *certiorari* is superseded *quia improvide emanavit*, the party suing it out is not liable to costs, for he ought not to be made liable for an expence occasioned by an improvident act of the court (3). Also, if the party succeeds in quashing the orders in part, he is not liable to costs: as, where a man and his wife and daughter were removed by two justices, and the order was confirmed at sessions. These orders, being removed into the King's Bench, were quashed as to the daughter, and confirmed as to the man and his wife. The court held, that the parish who brought the *cer-*

Or prosecutor succeeds in part

(1) See Rex *v.* Dore, And. 352. A conviction for deer-stealing removed under 3 Will. & Mary, c. 10. the words of which are, "full costs and damages. Probyn, J. said, the bill ought to be taxed as between attorney and client," and the amount of costs is not confined to the sum mentioned in the recognizance.

(2) This must be understood to mean "at the expiration of," i. e. that the ten days must elapse before the attachment can be granted; otherwise, instead of the indulgence of ten days, supposed to be offered by the legislature, the party would be liable to an attachment, immediately after a demand and refusal. This point has been so held, on similar words, in the stat. 5 & 6 W. & M. ch. 11. sect. 3. Rex *v.* Ireland, 3 Term Rep. 512.

(3) Rex *v.* Wakefield, Say. Law of Costs, 306.

tiorari

tiorari were unjustly burthened with the daughter, and had no other remedy but to come to the superior court; and the parliament never intended to punish them (*i. e.* with paying costs) for taking a legal remedy against a gravamen. (1)

But the court distinguished it from the following case, where the court affirmed an order of sessions as to the point of the appeal, but quashed a reservation in the same order as to costs, in case of a new removal; and it was determined that the prosecutor of the *certiorari* should pay costs (2). *Per curiam.* That is a very different case, for the party could not be affected by the part of the order which was quashed, till the sessions had made an actual order about the costs; and the bringing it up for the purpose of quashing that part was unnecessary, and consequently vexatious, which is the true rule to go by. (3)

But otherwise, if part quashed for informality.

If an order is sent down to the sessions to be re-stated, and is returned back amended, the party by whom it was originally removed is not liable to costs, if he abandons the prosecution forthwith (4). But if he disputes the amended order, instructing counsel, and taking the chance of the judgment of the court in his favour, when it comes up a second time, he must pay costs. (5)

Sent down

Where the party, entering into the recognizance, succeeds in making his rule absolute, the recognizance is discharged as a matter of course (6). But if his rule is

(1) Rex *v.* Madley, 2 Str. 1198.

(2) Rex *v.* Great Chart, ib. and Burr. S. C. 194.

(3) Rex *v.* Madley, ante, (1).

(4) Rex *v.* Hitcham, Burr. S. C. 504. Rex *v.* Bray, ib. 687. Rex *v.* Edgeworth, 4 Term Rep. 218.

(5) Rex *v.* Edgeworth, ante, (4).

(6) Rex *v.* Bray, Burr. S. C. 687.

discharged,

discharged, he cannot apply for the discharge of his recognizance until he has paid the costs (1), and, according to the words of the statute, complied with the order.

No power to award maintenance.

The court has no power to allow the expence incurred by maintaining the pauper between the time of giving the judgment in the court of quarter sessions, and that in the King's Bench, and they have refused to remit the original order of removal to the sessions for the purpose of enabling them by an exercise of jurisdiction in quashing it, to give the appellant parish the costs of maintaining the pauper during that period under 9 Geo. I. c. 7. s. 9. (2)

SECT.

(1) Rex *v.* Edgeworth, ante, 525. (4).

(2) See Rex *v.* Moor Critchell, ante, 518. (1). and the point was directly ruled in the following case.

By an order dated 2d Dec. 1812, two justices removed the pauper, his wife, and four children, from Monckton Deverell in the county of Wilts, to West Cranmore in the county of Somerset. Against this order, an appeal was entered at the Epiphany sessions holden for Wilts, and adjourned to the ensuing Easter sessions, when the order was confirmed, subject to the opinion of the court of King's Bench upon a case reserved. The case came on to be argued in Trinity term, but was directed by the court to stand over to the Michaelmas term following, when the order of sessions and the original order of two justices were quashed. Casberd on the part of the parish of West Cranmore now applied for a rule to shew cause why the order of this court should not be altered by omitting such part thereof as related to the quashing of the original order of the two justices, and that the same should only order that the order of sessions made in confirmation of the original order of the two justices be quashed; and that the justices below might be ordered to enter continuances to the sessions next ensuing the decision upon that rule, and then and there to quash the said original order of two justices, and to allow the respondents their costs pursuant to 9 Geo. I. c. 7. s. 9. The object of that application, he stated, was to supply a defect in the jurisdiction of the court of King's Bench, which had no power to allow costs to the respondents, who by an unjust removal had been put to a considerable expence in the maintenance of six persons for a period amounting nearly to a year; that by rescinding a part of the order of that court and remitting the original order of two justices to the sessions, the court below would not only by quashing the original order be enabled, but by the provisions of the stat. before mentioned, be compelled by granting the costs of maintenance, to do justice between the parties; and that the obstacle which presented itself in Rex *v.* Moor Critchell.

SECT. VII.

Of the Proceedings on Removal of Records of Conviction had before Justices of Peace into the Court of King's Bench. (1)

THE proceedings on removal of records of conviction had before justices of the peace into the court of King's Bench, differ in some respects from proceedings on removal of other orders, and therefore seem to require a particular explanation, at least, as to those points in which that difference consists.

The same notice of the application for a *certiorari* on the part of the defendant is necessary, as in the case of other orders; and when the *certiorari* has been granted, a similar recognizance to prosecute it must be given, Notice to remove convictions

Critchell, 2 East, 222. did not exist in this case, since the application being made in the same term as that in which decision upon the merits took place, the court were not called upon to review the judgment of a past term.

Lord Ellenborough, C. J. I think that there is the same objection to the present application as existed in the case referred to; for as the decision upon the rules, if granted, cannot take place till the next term, we shall then be equally called upon to revise a judgment of an antecedent term.

Le Blanc, J. The form of the rule of this court, quashing the original order of two justices, as well as the order of sessions, I take to have been the regular established form, from the earliest times. To grant therefore the rule, which is now applied for, would be a departure from the practice which has hitherto prevailed.

Bayley and Dampier, Justices, acc.

Rule refused.

Rex *v.* West Cranmore, B. R. Mich. 54 Geo. III. ex relat. Mr. Casberd, but that it may under some circumstances be made a condition in the rule. See Overnorton *v.* Salford, ante, 523. (3).

(1) This section is not strictly within the plan of the present work. But the information is so useful, and comes from a source so entirely to be relied upon for accuracy, that I cannot resist the temptation of inserting it.

unless

Recognizance. 4 Ann. c. 14. bond. unless the offence be against the statute of 4 Ann. c. 14. "for the better preservation of the game;" in which case, by section 2. of that statute, it is directed, that the party, against whom the conviction shall be made, shall give a bond to the prosecutor in the manner there prescribed; or, if it be an offence against the statute 15 Geo. III. c. 30. "for preventing the stealing of deer," a bond must be given to the justice or justices convicting, in the manner directed by section 19. of this statute.

16 Geo. III. c. 30.

Proceeding in B. R. for the argument. The record of conviction being returned into the court of King's Bench, in obedience to the writ of *certiorari*, it is not necessary to make a motion to file it, as in the case of other orders, but it is put upon the file of cour The defendant then, by his clerk in court, enters a *comparentia*, or appearance to the conviction; and either party may, by counsel, obtain a rule for a conciliui and procure the conviction to be set down in the crown paper for argument. Notice of this rule, and of the day appointed for the hearing, being given to the opposite party, paper books are delivered, as in the case of orders of justices; but when the conviction is called on in the paper, the junior counsel for the party objecting to the conviction begins; the junior counsel, on the other side, is heard in answer to his objections, and the defendants' counsel is heard in reply, but only one counsel is heard for each party. If the court affirm the conviction, the prosecutor is entitled to a *levari facias*, if a penalty has been adjudged, and not before levied, and to a side bar rule to tax his costs, in case the *certiorari* was sued out by the defendant. If the court quash the conviction, the defendant is entitled to have his recognizance or bond discharged.

Notice of the rule.

Remedy on affirmance for penalty.

And costs.

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